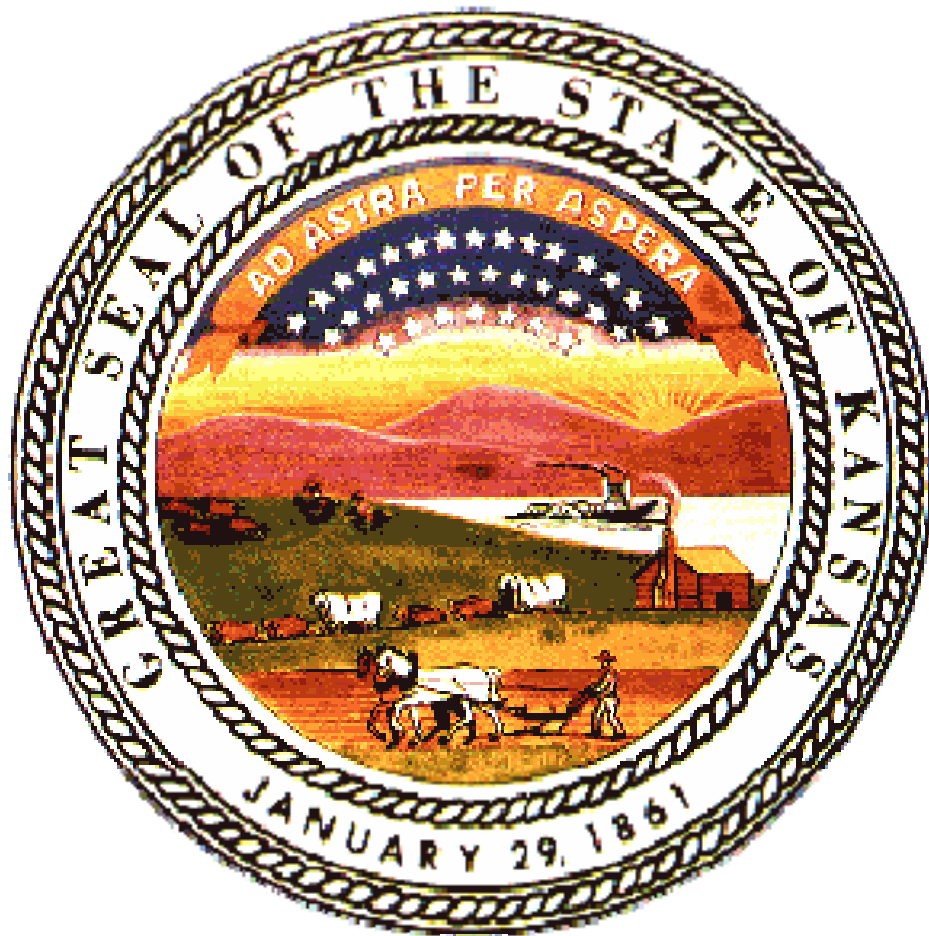


KANSAS

SENTENCING GUIDELINES



DESK REFERENCE MANUAL
2006

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.....	www.kansas.gov/ksc
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INTRODUCTION

The 2006 Kansas Sentencing Commission Desk Reference Manual (“Manual”) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 *et seq.* The Manual contains features that we hope will not only inform users of the latest developments in our Sentencing Guidelines but also help to facilitate more efficient use of the Manual and guidelines application.

For example, all of the 2006 Legislative Changes relative to our Sentencing Guidelines are summarized in one section at the beginning of the Manual. The Case Law annotations contained in Appendix A are in chronological order as of May 27, 2005. The Selected Attorney General Opinions contained in Appendix B have also been updated as of May 27, 2005. In addition, the Chart contained in Appendix C outlining non-statutory departure reasons that have been approved or disapproved by the Kansas appellate courts have been updated reflecting the most recent published decisions through May 27, 2005. Appendix A, Appendix B and Appendix C are only available for downloading from the Kansas Sentencing Commission webpage: www.kansas.gov/ksc. Further updates will be placed on the webpage as they become available.

The three statutory listings of felonies and misdemeanors in Appendix E and F have also been modified to reflect the specific statutory violations based upon the 2006 Legislative Changes. Appendix F containing the statutory listings of misdemeanors was expanded significantly in 2006. Therefore, due to budget constraints, the Alphabetical and Class sorts were removed from the Manual and are now only available for downloading from the Kansas Sentencing Commission webpage: www.kansas.gov/ksc.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our Staff for further information and assistance regarding related questions concerning the Manual, or in the implementation of the Kansas Sentencing Guidelines Act. Questions may be directed to our Staff at (785) 296-0923, or by the e-mail link found on the Kansas Sentencing Commission webpage.

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense(s) of conviction. Amendments to statutes are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

Changes to the penalties and/or statutory language, and newly enacted legislation listed within the 2006 Legislative Changes to the Kansas Sentencing Guidelines Act and Related Criminal Law are effective on the date listed below the change(s).

ADDITIONAL COPIES

Requests for additional copies of the 2006 Manual may be obtained from the Kansas Sentencing Commission at a cost of ten dollars each for a bound hard copy document and five dollars each for a computer diskette. This Manual may also be accessed via the Kansas Sentencing Commission web page at: www.kansas.gov/ksc at no charge.

This Manual is not copyrighted. The entire text of this Manual along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The 2006 Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which are always controlling.

2006 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act (K.S.A. 21-4701 *et seq.*) and other related criminal statutes, were made by the Kansas Legislature during the 2006 Legislative Session. These changes are summarized below under the headings of the Bills in which the changes were included.

Senate Bill 25

New Section 1 Creates the crime of terrorism which is defined as the commission of, the attempt to commit or the conspiracy to commit any felony with the intent to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of any unit of government. Terrorism is an off-grid person felony with a penalty of life imprisonment.

New Section 2 Creates the crime of illegal use of weapons of mass destruction, an off-grid person felony with a penalty of life imprisonment. The illegal use of weapons of mass destruction is:

- (1) intentionally, knowingly and without lawful authority, developing, producing, stockpiling, transferring, acquiring, retaining or possessing any:
 - (A) Biological agent, toxin or delivery system for use as a weapon;
 - (B) chemical weapon; or
 - (C) nuclear materials or nuclear byproduct materials for use as a weapon;
- (2) knowingly assisting a foreign state or any organization to do any such activities as specified in paragraph (1); or
- (3) attempting, threatening or conspiring to do any such activities as specified in paragraph (1) or (2).

New Section 3 Creates a severity level 1, person felony for anyone guilty of furthering the commission of the crimes of terrorism or illegal use of weapons of mass destruction.

K.S.A. 2005 Supp. 21-3106 (Statute of limitations) is amended to provide that terrorism and illegal use of weapons of mass destruction do not have a statute of limitations for prosecution.

K.S.A. 21-3301, 21-3302, and 21-3303 (Anticipatory crimes) are amended exempting an attempt, conspiracy or solicitation of either terrorism or illegal use of weapons of mass destruction from eligibility for a reduced severity level. As a result, an attempt, conspiracy or solicitation to commit either crime is also an off-grid person felony.

K.S.A. 2005 Supp. 21-4706 (Sentencing) is amended to include terrorism and illegal use of weapons of mass destruction in the list of off-grid crimes, the sentence for which shall be life imprisonment, not subject to the provisions for suspended sentence, community service or probation.

K.S.A. 22-2515 (Search and seizure) is amended to include the crimes of terrorism and illegal use of weapons of mass destruction in the list of crimes for which an *ex parte* order authorizing the interception of wire, oral or electronic communication may be issued by a judge of competent jurisdiction.

K.S.A. 22-3101 (Inquisitions) is amended to include the crimes of terrorism and illegal use of weapons of mass destruction in the list of crimes for which prosecuting attorneys are permitted to issue subpoenas, for investigative purposes, without a court order.

K.S.A. 60-4104 (Forfeiture- offenses) is amended to include furtherance of terrorism or illegal use of weapons of mass destruction in the list of conduct or offenses giving rise to forfeiture.

** Effective upon publication in the statute book.*

House Sub for Senate Bill 35

New Section 1 Provides for regulation of sexually-oriented signs. Any violation of provisions of this act is a Class C misdemeanor. In addition, each week a violation continues to exist shall constitute a separate offense.

** Effective upon publication in the statute book.*

House Sub for Senate Bill 51

New Section 1 Creates the crime of trafficking in counterfeit drugs which is defined as intentionally manufacturing, distributing, dispensing, selling or delivering for consumption purposes, or holding or offering for sale, any counterfeit drug.

Trafficking in Counterfeit drugs with a retail value of:	Severity Level	F / M	P / NP
\$25,000 or more.	7	F	NP
At least \$500 but less than \$25,000.	9	F	NP
Less than \$500.	A	M	NP

** Effective upon publication in the statute book.*

House Sub for Senate Bill 196

New Section 1 Makes it a severity level 6, nonperson felony for any person to knowingly and with the intent to defraud, possess or use a scanning device to access, read, obtain, memorize or store, temporarily or permanently, information encoded on the computer chip or magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card.

Subsection (b) makes it a severity level 6, nonperson felony for any person to knowingly and with the intent to defraud, possess or use a reencoder to place encoded information on the computer chip or magnetic strip or stripe of a payment card or any electronic medium that allows an authorized transaction to occur, without the permission of the authorized user of the payment card from which the information is being reencoded.

K.S.A. 2005 Supp. 21-4018(c) (Identity theft/fraud) is amended to provide that if the monetary loss to the victim or victims is more than \$100,000, identity theft is a severity level 5, nonperson felony. If the loss is \$100,000 or less, identity theft remains a severity level 8, nonperson felony.

K.S.A. 60-4104 (Forfeiture - offenses) is amended to add violations of new section 1 to the list of conduct and offenses giving rise to forfeiture.

K.S.A. 60-4105 (Forfeiture – property) is amended to include any computer, computer system, computer network or any software or data owned by a defendant and used during the commission of a violation of new section 1 to the list of property subject to forfeiture.

** Effective upon publication in the statute book.*

Senate Bill 261 (revised Kansas Juvenile Justice Code)

New Section 11 Provides the confidentiality provisions pertaining to juvenile diagnostic, treatment or medical records, an intentional violation of which is a class C nonperson misdemeanor.

New Section 17 Provides that the results of tests or reports, or information therein, obtained under this section shall be confidential and not be divulged to any unauthorized person. Any violation of this section is a class C nonperson misdemeanor.

** Effective on and after January 1, 2007, and its publication in the statute book.*

Senate Bill 297

New Section 4 Allows an in-state farm winery and out-of-state winery, manufacturing wine in quantity not exceeding 100,000 gallons, to ship wine to a licensed retailer in Kansas for delivery to persons over 21 years of age. The retailer would be required to collect the enforcement tax and may charge up to \$5 to the purchaser for each delivery. The purchaser would be responsible for payment of the wine and shipping costs to the winery permit holder.

Any person who knowingly makes, participates in, transports, imports or receives any wine without possessing a valid shipping permit issued pursuant to this section is guilty of a class B misdemeanor.

New Section 6 Amends the Kansas Liquor Control act to allow an out-of-state large winery manufacturing wine in a quantity exceeding 100,000 gallons to ship wine to a licensed distributor who would deliver it to a retailer designated by the consumer. The consumer, persons over 21 years of age, would be responsible for payment of the purchase price and all shipping costs. The large winery would be responsible for collecting and remitting the gallonage tax to the Director of Taxation.

Any person who knowingly makes, participates in, transports, imports or receives any wine without possessing a valid large winery shipping permit issued pursuant to this section is guilty of a class B misdemeanor.

** Effective upon publication in the statute book.*

Senate Bill 365

New Section 1 Creates the Kansas estate tax act which is no longer tied directly to federal law.

New Section 32 Creates a class B nonperson misdemeanor for any violation of confidentiality provisions.

New Section 35 Creates an unclassified misdemeanor which shall be penalized by a fine of not more than \$1000, not less than 30 days nor more than one year, in the county jail, or both, for any personal representative who, with fraudulent intent, fails to pay any tax or make, render or sign any return, or supply any information as required under this act. In addition, any personal representative who intentionally signs a fraudulent return shall be guilty of an unclassified felony, the penalty for which shall be imprisonment for a term not exceeding five years.

** Effective on and after January 1, 2007, and its publication in the statute book.*

Senate Bill 366

New Section 1 Provides that a person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has no duty to retreat and has the right to stand such person's ground and meet force with force.

New Section 2 Provides that a person who uses force which, subject to the provisions of K.S.A. 21-3214, is justified pursuant to K.S.A. 21-3211, 21-3212 or 21-3213, is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, "criminal prosecution" includes arrest, detention in custody and charging or prosecution of the defendant.

(b) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (a), but the agency shall not arrest the person for using force unless it determines that there is probable cause for the arrest.

K.S.A. 21-3211 (Use of force, defense of person) is amended to add subsections (b) and (c) which provide that a person is justified in the use of deadly force in self-defense or defense of a third person, if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person. There is no requirement to retreat if such person is using force to protect such person or a third person.

K.S.A. 21-3212 (Use of force, defense of dwelling) is amended to add subsections (b) and (c) which provide that a person is justified in the use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling or occupied vehicle if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or another. There is no requirement to retreat if such person is using force to protect such person's dwelling or occupied vehicle.

New Section 5 Creates the Criminal Street Gang Prevention Act, the provisions of which are included in sections 5 through 9.

New Section 7 Creates the crime of recruiting criminal street gang membership which is defined as causing, encouraging, soliciting or recruiting another person to join a criminal street gang that requires, as a condition of membership or continued membership, the commission of any crime or membership initiation by submission to a sexual or physical assault that is criminal in nature, or would be criminal absent consent by the initiated. Recruiting criminal street gang membership is a severity level 6, person felony.

New Section 8 Creates the crime of criminal street gang intimidation which is defined as the communication, directly or indirectly with another, any threat of personal injury or actual personal injury to another or any threat of damage or actual damage to property of another with the intent to: (1) Deter such person from assisting a criminal street gang member or associate to withdraw from such criminal street gang; or (2) punish or retaliate against such person for having withdrawn from a criminal street gang. Criminal street gang intimidation is a severity level 5, person felony.

K.S.A. 2005 Supp. 22-3901 (Common nuisances) is amended to include criminal street gang activity in the list of unlawful activities declared to be common nuisances.

K.S.A. 2005 Supp. 21-4716(c)(2) (Departure factors) is amended to provide that whether a crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager or supervisor, shall be an aggravating factor to be considered in determining whether substantial and compelling reasons for a departure exist. Subsection (e) is added to provide that upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist.

The following statutes are amended to *raise the threshold of loss* for a felony violation from \$500 to \$1000: K.S.A. 16-305, 19-3519, 21-3720, 21-3729, 21-3734, 21-3902, 21-3904, 21-3905, 21-4111, 39-717, 40-247, 40-2,118, 44-5,125, and K.S.A. 2005 Supp. 21-3437, 21-3763, 21-3846, 32-1005, 40-5013, and 47-1827.

K.S.A. 65-4150(c) (Controlled substance definitions) is amended to remove the term “products” from the definition of “drug paraphernalia.” See *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, review denied 474 Kan. 1115 (2002).

K.S.A. 2005 Supp. 65-7006(e) (Chemical control – precursors) is amended to change the severity level for a violation **from a drug severity level 1 to a drug severity level 2.**

** Effective upon publication in the Kansas register. Published on May 25, 2006.*

Senate Bill 371

New Section 2 amends the Kansas Uniform Commercial Driver’s License Act to provide that a violation of any of the provisions of the act shall be a class B misdemeanor unless otherwise provided by the act.

Various other sections of the Kansas Uniform Commercial Drivers’ License Act are amended to bring it in compliance with the Federal Motor Carrier Safety Improvement Act. The bill provides civil penalties for drivers and employers who are convicted of violating the Kansas Uniform Commercial Drivers’

License Act and includes provisions amending the notification of a conviction and the disqualification actions for commercially licensed drivers. Another provision provides that a civil penalty for violations of a Corporation Commission out-of-service order would not be enforced if a civil penalty for violation of an out-of-service order was enforced against a driver under New Section (1)(a) or against the employer under New Section (1)(b) of the bill.

** Effective upon publication in the statute book.*

Senate Bill 374

K.S.A. 8-128 (Registration of vehicles) is amended to clarify the conditions under which self-propelled cranes are exempt from registration by specifying that they cannot be used to transport property, except when required for the operation of the crane itself.

K.S.A. 2005 Supp. 8-142 (Automobiles – unlawful acts) is amended to provide that it is an unclassified misdemeanor punishable by a fine of not less than \$500 for a person to unlawfully claim that a motor vehicle is exempt from registration as a self-propelled crane.

** Effective upon publication in the Kansas register. Published April 27, 2006.*

Senate Bill 404

K.S.A. 2005 Supp. 79-3606 (Tax exempt sales) is amended to provide that any contractor or any agent, employee or subcontractor thereof, who shall use or otherwise dispose of any materials purchased under a tax exempt certificate for any purpose other than that for which such a certificate is issued without the payment of the sales or compensating tax otherwise imposed upon such materials, shall be guilty of an unclassified misdemeanor and, upon conviction therefor, shall be subject to the penalties provided for in subsection (g) of K.S.A. 79-3615, and amendments thereto. This provision is included in new subsections (iii), (qqq), (sss), (ttt), and (uuu).

** Effective upon publication in the statute book.*

Senate Bill 408

K.S.A. 2005 Supp. 21-4310 (Cruelty to animals) is amended to provide that intentionally and maliciously killing, injuring, maiming, torturing, burning or mutilating any animal is a nongrid, nonperson felony the penalty for which shall be not less than 30 days or more than one year's imprisonment and a fine of not less than \$500 nor more than \$5000. In addition, during the mandatory 30 days imprisonment, the offender shall have a psychological evaluation prepared for the court to assist the court in determining conditions of probation. Such conditions shall include, but not be limited to, the completion of an anger management program.

Subsection (d)(2) is amended to provide that a second or subsequent conviction for cruelty to animals as described in subsections (a)(2), (a)(3), (a)(4), and (a)(5) is a nongrid, nonperson felony the penalty for which shall be not less than five days or more than one year's imprisonment.

K.S.A. 21-4317(a) (Illegal ownership/keeping of animal) is amended to provide that owning or keeping an animal within five years of a conviction of cruelty to animals as defined in subsection (a)(1) of K.S.A. 21-4310 is within the definition of illegal ownership or keeping of an animal which is a class B nonperson misdemeanor.

K.S.A. 21-4318(c) (Harming or killing certain dogs) is amended to provide that inflicting harm, disability or death to a police dog, arson dog, assistance dog, game warden dog or search and rescue dog is a nongrid, nonperson felony the penalty for which shall be not less than 30 days or more than one year's imprisonment and a fine of not less than \$500 nor more than \$5,000. During the mandatory 30 days imprisonment, such offender shall have a psychological evaluation prepared for the court to assist the court in determining conditions of probation. Such conditions shall include, but not be limited to, the completion of an anger management program.

K.S.A. 2005 Supp. 21-4704(i) (Sentencing guidelines) is amended to include the felony violations of K.S.A. 21-4310 and K.S.A. 21-4318 within the list of nongrid felonies, the penalties for which shall be provided by the specific mandatory sentencing requirements of the statute section violated. Any term of imprisonment imposed for these crimes shall not be served in the custody of the secretary of corrections.

** Effective upon publication in the statute book.*

Senate Bill 411

K.S.A. 2005 Supp. 66-1,130(b)(2) is amended to provide that certain motor carrier safety violations are unclassified misdemeanors while others are traffic infractions. Such misdemeanor violations include:

- All hazardous materials violations;
- False report of drivers' record of duty status;
- Driver uses or is in possession of drugs;
- Possession, use or under influence of alcohol four hours prior to duty;
- Violation of out-of-service order for alcohol violation;
- Fraudulent records;
- Failing to comply with an unsatisfactory safety rating, out-of-service;
- Failing to comply with an imminent hazard, out-of-service;
- Operating in interstate commerce on or after out-of-service order;
- Refusal to submit to a required alcohol or controlled substance test;
- Assistance in investigations and special studies;
- Refusal to allow inspections of motor vehicles in operation;
- Interstate driver under 21 years of age;
- Non-English speaking driver;
- Driving a commercial motor vehicle while disqualified;
- Unsafe operations of commercial motor vehicle forbidden;
- Failure to correct defects noted on inspection report;
- Carrier requiring or allowing operation of vehicle driver under influence of alcohol or drugs;
- Railroad grade crossing, stop required;
- Driving commercial motor vehicle after placed out-of-service; and
- Inspection, repair and maintenance, parts and accessories.

** Effective upon publication in the statute book.*

Senate Bill 417

New Section 8 Creates a new class A nonperson misdemeanor for any person who:

- Knowingly and intentionally defaces, destroys, removes or alters any hull identification number required for a vessel, without written authorization from the secretary;
- Knowingly places or stamps any serial number upon a vessel other than a number assigned to the vessel by the secretary; or
- Knowingly sells, barter, exchanges, or possesses any vessel if the original hull identification number has been destroyed, removed, altered or defaced.

** Effective on and after January 1, 2007, and its publication in the statute book.*

Senate Bill 418 (Personal and Family Protection Act)

New Section 10 Provides a list of locations that a licensee is not allowed to carry a concealed weapon. A violation of this section is a class A misdemeanor.

New Section 11 Provides that it shall be a class B misdemeanor for any licensee to carry a concealed weapon in violation of any conspicuously posted restriction or prohibition set forth by any employer, business owner or operator, or property owner.

K.S.A. 2005 Supp. 21-4201 (Criminal use of weapons) is amended to exempt persons licensed to carry a concealed weapon under the personal and family protection act from subsection (a)(4) of this statute.

** Effective upon publication in the statute book.*

House Sub for Senate Bill 431

K.S.A. 2005 Supp. 21-3436(a)(19) (Inherently dangerous felony) is added to provide that intentionally causing or permitting a child under the age of 18 to be placed in a situation in which the child's life, body or health is injured or endangered is an inherently dangerous felony.

K.S.A. 2005 Supp. 21-3608a(a)(2) (Aggravated endangering of a child) is added to broaden the statute's application and create a severity level 9, person felony for anyone who *recklessly causes or permits a child under 18 to be placed in a situation in which the child's life, body or health is injured or endangered*.

K.S.A. 21-3719 (Aggravated arson) is amended to add subsection (a)(2) which provides that arson which results in great bodily harm or disfigurement to a firefighter or law enforcement officer in the course of fighting or investigating the fire is a severity level 3, person felony.

K.S.A. 2005 Supp. 21-4714(b)(9) (Presentence investigation report) is amended to clarify that for defendants being sentenced for convictions of drug possession (K.S.A. 65-4160 or 65-4162) and meet the requirements of K.S.A. 2005 Supp. 21-4729, and amendments thereto, the drug *abuse* assessment, as provided in K.S.A. 2005 Supp. 21-4729, shall be included as part of the presentence investigation.

K.S.A. 2005 Supp. 21-4729(b) (Nonprison sanction, SB 123) is amended to provide that the drug abuse assessment, as required in the presentence investigation, shall include: (1) a clinical interview with a mental health professional and a recommendation concerning drug abuse treatment for the offender; and

(2) a criminal risk-need assessment, unless otherwise specifically ordered by the court. The criminal risk-need assessment shall assign a high or low risk status to the offender.

Subsection (f)(1) is amended to provide that offenders sentenced to drug abuse treatment programs under this statute shall be discharged from such program if the offender: (A) is convicted of *a new felony*; or (B) has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding.

Subsection (h) is added to provide in subparagraph (1) that the following offenders who meet the requirement of subsection (a) (SB 123 treatment) shall not be subject to the provisions of this section (SB 123 treatment) and *shall be sentenced as otherwise provided by law*:

- (A) Offenders who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision; or
- (B) Offenders who are not lawfully present in the United States and being detained for deportation.

Such sentence shall not be considered a departure and shall not be subject to appeal.

K.S.A. 2005 Supp. 21-3413 (Battery against a LEO) is amended to expand its application to include uniformed university or campus police officers.

Battery Against a Law Enforcement Officer	Severity Level	F / M	P / NP
Intentionally causing physical contact, done in a rude, insulting or angry manner	A	M	P
Intentionally or recklessly causing bodily harm	7	F	P
Any battery against any state correctional officer/employee; juvenile correctional facility officer/employee; juvenile detention facility officer/employee; or city or county correctional officer/employee.	5	F	P

K.S.A. 2005 Supp. 21-3415 (Aggravated battery against a LEO) is amended to change the severity level for certain violations.

Aggravated Battery Against a Law Enforcement Officer	Severity Level	F / M	P / NP
Intentionally causing great bodily harm or disfigurement	3	F	P
Intentionally causing bodily harm with a motor vehicle	3	F	P
Intentionally causing bodily harm with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted	* 4	F	P
Intentionally causing physical contact done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted	* 4	F	P

* Severity level changed in 2006 Legislative Session.

New Section 14 Creates the crime of battery against a mental health employee which is defined as, any battery, as defined in K.S.A. 21-3412, and amendments thereto, committed against a mental health employee by a person in the custody of the secretary of social and rehabilitation services, while such employee is engaged in the performance of such employee's duty. Battery against a mental health employee is a severity level 7, person felony.

* *Effective upon publication in the statute book.*

Senate Bill 434

K.S.A. 2005 Supp. 75-5291(a)(2)(E) (Community correctional services) is amended to provide that placement of offenders in community correctional services programs by the court shall be limited to placement of adult offenders including, *on and after July 1, 2008, for offenders who are expected to be subject to supervision in Kansas, [those] who are determined to be “high risk or needs, or both” by the use of a statewide, mandatory, standardized risk assessment tool or instrument which shall be specified by the Kansas sentencing commission.*

Subsection (a)(3) is amended to extend the Johnson County pilot project to July 1, 2008.

K.S.A. 2005 Supp. 21-4714(c) (Presentence investigation) is amended to include the *risk and needs assessments* in the list of elements of the presentence investigation only accessible to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas sentencing commission.

** Effective upon publication in the statute book.*

Senate Bill 506

K.S.A. 2005 Supp. 22-4902 (Offender registration) is amended to include, “*any person who, on or after July 1, 2006, is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony,*” within the list of offenders required to register under the Kansas offender registration act. Notation of such is now required on the 2006 Journal Entry form.

K.S.A. 2005 Supp. 22-4906 (Registration requirements) is amended to add subsection (d) which requires lifetime registration for any person convicted of:

- (1) Aggravated trafficking, as defined in K.S.A. 2005 Supp. 21-3447, and amendments thereto, if the victim is less than 14 years of age;
- (2) rape, as defined in subsection (a)(2) of K.S.A. 2005 Supp. 21-3502, and amendments thereto;
- (3) aggravated indecent liberties with a child, as defined in subsection (a)(3) of K.S.A. 21-3504, and amendments thereto;
- (4) aggravated criminal sodomy, as defined in subsection (a)(1) or (a)(2) of K.S.A. 21-3506, and amendments thereto;
- (5) promoting prostitution, as defined in K.S.A. 21-3513, and amendments thereto, if the prostitute is less than 14 years of age; or
- (6) sexual exploitation of a child, as defined in subsection (a)(5) or (a)(6) of K.S.A. 21-3516, and amendments thereto.

Subsection (h) is amended to include in subparagraph (1) that a person who is adjudicated a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime as set forth in subsection (c) of K.S.A. 22-4902, *and such crime is an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704*, shall be require to register until such person reaches 18, the expiration of 5 years from the date of adjudication, or, if confined, 5 years from date of release from confinement, whichever date is later.

Subparagraph (2) provides for judicial discretion when ordering registration of juvenile offenders. It provides that; (A) a person who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is not an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, and amendments thereto, may, by the court:

- (i) Be required to register pursuant to the provisions of paragraph (1);
 - (ii) not be required to register if the judge, on the record, finds substantial and compelling reasons therefor; or
 - (iii) be required to register with the sheriff pursuant to K.S.A. 22-4904, and amendments thereto, but such registration information shall not be open to inspection by the public or posted on any internet website, as provided in K.S.A. 22-4909, and amendments thereto. If the court requires the juvenile to register but such registration is not open to the public, the juvenile shall provide a copy of such court order to the sheriff at the time of registration. The sheriff shall forward a copy of such court order to the Kansas bureau of investigation.
- (B) If such juvenile offender violates a condition of release during the term of the conditional release, the judge may require the juvenile offender to register pursuant to paragraph (1).

** Effective upon publication in the Kansas Register. Published June 1, 2006.*

Senate Bill 578

New Section 12 Creates a class A nonperson misdemeanor for any violation of this act which pertains to dangerous regulated animals and the possession thereof.

** Effective upon publication in the statute book.*

House Bill 2118

New Section 4 Creates a class A misdemeanor for violations of the confidentiality provisions pertaining to applications for and issuance of licenses under the personal and family protection act.

New Section 9 Creates a class A nonperson misdemeanor for a person licensed pursuant to this act to carry a concealed weapon while under the influence of alcohol or drugs, or both. This section creates a process for law enforcement to follow when determining whether a violation of this section exists as well as for seizing a person's license and weapon for a violation under this section. The process includes certification to the attorney general that the process has been followed. Any person who signs a certification submitted to the attorney general knowing it contains a false statement is guilty of a class B nonperson misdemeanor.

K.S.A. 21-4218(c) (Unlawful possession of a firearm on state grounds) is amended to change the penalty **from** a class B nonperson select misdemeanor **to** a class A [nonperson] misdemeanor.

K.S.A. 2005 Supp. 21-4203(a) (Criminal disposal of a firearm) is amended to add subparagraph (6) which provides that, on and after January 1, 2007, selling, giving or otherwise *transferring any firearm to any person who is or has been a mentally ill person subject to involuntary commitment for care and treatment, as defined in K.S.A. 59-2946, and amendments thereto, or a person with an alcohol or substance abuse problem subject to involuntary commitment for care and treatment as defined in K.S.A. 59-29b46, and amendments thereto, and such person has not received a certificate of restoration*

pursuant to section 12, and amendments thereto shall be criminal disposal of a firearm, a class A nonperson misdemeanor.

K.S.A. 2005 Supp. 21-4204(a) (Criminal possession of a firearm) is amended to add subparagraph (7) which provides that, on and after January 1, 2007, *possession of any firearm by a person who is or has been a mentally ill person subject to involuntary commitment for care and treatment, as defined in K.S.A. 59-2946, and amendments thereto, or persons with an alcohol or substance abuse problem subject to involuntary commitment for care and treatment as defined in K.S.A. 59-29b46, and amendments thereto shall be criminal possession of a firearm. If such person has not received a certificate of restoration pursuant to section 12, and amendments thereto a violation of subsection (a)(7), is a severity level 8, nonperson felony.*

** Effective upon publication in the statute book.*

House Bill 2352 (revised Kansas Code for Care of Children)

New Section 18 Pertains to reporting of suspected child abuse and provides in subsection (e) that:

1. Willful and knowing failure to make a report required by this section is a class B misdemeanor;
2. Intentionally preventing or interfering with the making of a report required by this section is a class B misdemeanor;
3. Any person who willfully and knowingly makes a false report pursuant to this section or makes a report that such person knows is lacking in factual foundation is guilty of a class B misdemeanor.

New Section 19 Provides that no employer shall terminate the employment of, prevent or impair the practice or occupation of, or impose any other sanction on, any employee because the employee made an oral or written report to, or cooperated with an investigation by, a law enforcement agency or the secretary relating to harm inflicted upon a child which was suspected by the employee of having resulted from the physical, mental or emotional abuse or neglect or sexual abuse of the child. A violation of this section is a class B misdemeanor.

** Effective on and after January 1, 2007, and its publication in the statute book.*

House Bill 2485

New Section 1 Provides in subsection (a) that a notary public, not admitted to practice law, and who advertises services in non-English must include the following disclaimer in the same language; "I am not authorized to practice law and have no authority to give advice on immigration law or other legal matters."

Subsection (b) provides that the notary shall not use the term "notario publico" or any equivalent non-English term unless the notary complies with the prior requirement.

Subsection (c) provides that any violation of this section is a class B misdemeanor.

** Effective upon publication in the statute book.*

House Bill 2554

K.S.A. 2005 Supp. 21-2511 (Collection of specimens) is amended to add several subsections including subsection (m) which provides that any person who is subject to the requirements of this section, and who, after receiving notification of the requirement to provide a DNA specimen, knowingly refuses to provide such DNA specimen, shall be a guilty of a class A nonperson misdemeanor.

** Effective upon publication in the statute book.*

Senate Sub for House Bill 2576 (Jessica's Law)

New Section 1 Subsection (a) provides that an aggravated habitual sex offender shall be sentenced to imprisonment for life without the possibility of parole in the custody of the secretary of corrections.

Subsection (c)(1) defines an “aggravated habitual sex offender” as a person who, on and after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction, has been convicted on at least two prior conviction events of any sexually violent crime.

Subsection (c)(2) defines “prior conviction event” as one or more felony convictions of a sexually violent crime, occurring on the same day and within a single count. These convictions may result from multiple counts within an information or from more than one information. If a person crosses a county line and commits a felony as part of the same criminal act or acts, such felony, if such person is convicted, shall be considered part of the prior conviction event.

Subsection (c)(3) defines “sexually violent crime” as used in this section to include:

- A) Rape, K.S.A. 21-3502, and amendments thereto;
- B) Indecent liberties with a child, K.S.A. 21-3503, and amendments thereto;
- C) Aggravated indecent liberties with a child, K.S.A. 21-3504, and amendments thereto;
- D) Criminal sodomy, subsection (a)(2) and (a)(3) of K.S.A. 21-3505, and amendments thereto;
- E) Aggravated criminal sodomy, K.S.A. 21-3506, and amendments thereto;
- F) Indecent solicitation of a child, K.S.A. 21-3510, and amendments thereto;
- G) Aggravated indecent solicitation of a child, K.S.A. 21-3511, and amendments thereto;
- H) Sexual exploitation of a child, K.S.A. 21-3516, and amendments thereto;
- I) Aggravated sexual battery, K.S.A. 21-3518, and amendments thereto;
- J) Aggravated incest, K.S.A. 21-3603, and amendments thereto;
- K) Any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent crime as defined in this section;
- L) An attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, and amendments thereto, of a sexually violent crime as defined in this section; or
- M) Any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated. As used in this subparagraph, “sexually motivated” means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant’s sexual gratification.

New Section 2 Subsection (a)(1) provides that, except as in subsection (b) or (d), a defendant who is 18 years of age or older and convicted of the following crimes, committed on or after July 1, 2006, shall be sentenced to a term of life imprisonment with a mandatory minimum term of not less than 25 years (Hard 25), unless the court determines that the defendant should be sentenced as determined in paragraph (2):

- A) Aggravated trafficking, as defined in K.S.A. 2005 Supp. 21-3447, and amendments thereto, if the victim is less than 14 years of age;
- B) rape, as defined in subsection (a)(2) of K.S.A. 21-3502, and amendments thereto;
- C) aggravated indecent liberties with a child, as defined in subsection (a)(3) of K.S.A. 21-3504, and amendments thereto;
- D) aggravated criminal sodomy, as defined in subsection (a)(1) or (a)(2) of K.S.A. 21-3506, and amendments thereto;
- E) promoting prostitution, as defined in K.S.A. 21-3513, and amendments thereto, if the prostitute is less than 14 years of age,
- F) sexual exploitation of a child, as defined in subsection (a)(5) or (a)(6) of K.S.A. 21-3516, and amendments thereto; and
- G) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, and amendments thereto, of an offense defined in paragraphs (A) through (F).

Subparagraph (2) provides that the provision of paragraph (1) requiring the Hard 25 shall not apply if the court finds:

- A) the defendant is an aggravated habitual sex offender and sentences the defendant to life imprisonment pursuant to section 1; or
- B) the defendant, because of the defendant's criminal history classification, is subject to presumptive imprisonment with a sentencing range exceeding 300 months, pursuant to the sentencing guidelines grid for nondrug crimes. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range.

Subsection (b) provides that, on and after July 1, 2006, if a defendant, 18 years or older, is convicted of one of the crimes listed above in subsection (a)(1) and the defendant has previously been convicted of a crime listed in subsection (a)(1) or a crime under a law of another jurisdiction which is substantially similar, the court shall sentence the defendant to a term of imprisonment to life with a mandatory minimum of not less than 40 years (Hard 40), unless the court finds:

- A) the defendant is an aggravated habitual sex offender and sentences the defendant to life imprisonment pursuant to section 1; or
- B) the defendant, because of the defendant's criminal history classification, is subject to presumptive imprisonment with a sentencing range exceeding 480 months, pursuant to the sentencing guidelines grid for nondrug crimes. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range.

Subsection (c) provides that offenders sentenced under subsection (a) or (b), shall not be eligible for probation or suspension, modification or reduction of sentence. In addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving the mandatory term of imprisonment, without the application of good time credits.

Subsection (d) provides that on or after July 1, 2006, for a first time conviction of an offense listed in paragraph (a)(1), the sentencing judge shall impose the mandatory minimum term of imprisonment provided by subsection (a), unless the judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure. If the sentencing judge departs from such mandatory minimum term of imprisonment, the judge shall state on the record at the time of sentencing the

substantial and compelling reasons for the departure. The departure sentence shall be the sentence pursuant to the sentencing guidelines act, K. S. A. 21-4701 et seq., and amendments thereto, and no sentence of a mandatory minimum term of imprisonment shall be imposed hereunder. As used in this subsection, mitigating circumstances shall include, but are not limited to, the following:

1. The defendant has no significant history of prior criminal activity.
2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
3. The victim was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
4. The defendant acted under extreme distress or under the substantial domination of another person.
5. The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.
6. The age of the defendant at the time of the crime.

New Section 3 Creates the crime of unlawfully tampering with electronic monitoring equipment which is defined as intentionally removing, disabling, altering, tampering with, damaging or destroying any electronic monitoring equipment used pursuant to court order or as a condition of parole. Unlawfully tampering with electronic monitoring equipment is a severity level 6, nonperson felony.

New Section 7 Creates two new crimes pertaining to electronic solicitation of children. Electronic solicitation is, by means of communication conducted through the telephone, internet, or by other electronic means is:

- Enticing or soliciting a person whom the offender believes to be a child under the age of 16 to commit or submit to an unlawful sexual act, which is a severity level 3, person felony; or
- Enticing or soliciting a person whom the offender believes to be a child under the age of 14 to commit or submit to an unlawful sexual act, which is a severity level 1, person felony.

K.S.A. 2005 Supp. 21-3502(c) (Rape) is amended to provide that rape, as described in subsection (a)(2), sexual intercourse with a child under 14 years of age, is an off-grid person felony when the offender is 18 years of age or older.

K.S.A. 21-3506(c) (Aggravated criminal sodomy) is amended to provide that aggravated criminal sodomy as described in subsection (a)(1), sodomy with a child under 14 years of age, or (a)(2), causing a child under 14 years of age to engage in sodomy with any person or animal, is an off-grid person felony when the offender is 18 years of age or older. In all other cases, aggravated criminal sodomy is now a **severity level 1**, person felony.

K.S.A. 2005 Supp. 21-3447(b) (Aggravated trafficking) is amended to provide that aggravated trafficking is an off-grid person felony when the offender is 18 years of age or older and the victim is under 14 years of age.

K.S.A. 21-3504(c) (Aggravated indecent liberties with a child) is amended to provide that aggravated indecent liberties with a child as described in subsection (a)(3), engaging in lewd fondling or touching or soliciting such with a child under 14 years of age, is an off-grid person felony when the offender is 18 years of age or older.

K.S.A. 21-3513 (b) (Promoting prostitution) is amended to add subparagraph (4) which provides that promoting prostitution is an off-grid person felony when the offender is 18 years of age or older and the prostitute is less than 14 years of age.

K.S.A. 2005 Supp. 21-3516 (Sexual exploitation of a child) is amended to add two new criminal acts and subsequent penalties. Subsection (a)(5) is added to provide that sexual exploitation of a child includes *employing, using, persuading, inducing, enticing or coercing a child under 14 years of age to engage in sexually explicit conduct for the purpose of promoting any performance*. Subsection (a)(6) is also added to provide that sexual exploitation of a child includes *promoting any performance that includes sexually explicit conduct by a child under 14 years of age, knowing the character and content of the performance*.

Subsection (c) is amended to provide that a violation of subsection (a)(5) or (a)(6) is an off-grid person felony when the offender is 18 years of age or older.

Note: The question remains as to what the penalty will be for a violation of either if these subsections by an offender under 18 years of age whose victim is under 14 years of age.

K.S.A. 21-3812 (Aiding a felon) is amended to add subsection (d) which provides that aiding a person required to register under the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, is knowingly harboring, concealing or aiding any person who is required to register under the act and who is not in compliance with the requirements of the act with intent that such person shall avoid or escape from registration, arrest, trial, conviction, punishment or any criminal charges arising from the person's failure to comply with the requirements of the act. Aiding a person required to register under the Kansas offender registration act is a severity level 5, person felony.

K.S.A. 2005 Supp. 21-4638 (sentencing, Hard 40 or 50) is amended to provide that *for crimes committed on or after July 1, 2006, a mandatory minimum term of imprisonment of 50 years shall not apply if the court finds that the defendant, because of the defendant's criminal history classification, is subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 600 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range*.

K.S.A. 2005 Supp. 21-4704 (Sentencing guidelines) is amended to add subsection (m) which provides that the sentence for a violation of K.S.A. 22-4903 or subsection (d) of K.S.A. 21-3812, and amendments thereto, shall be presumptive imprisonment. If an offense under such sections is classified in grid blocks 5-E, 5-F, 5-G, 5-H or 5-I, the court may impose an optional nonprison sentence upon making the following findings on the record:

- (1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism, such program is available and the offender can be admitted to such program within a reasonable period of time; or
- (2) the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence pursuant to this section shall not be considered a departure and shall not be subject to appeal.

K.S.A. 2005 Supp. 21-4706 (Good time) is amended to add subsection (d) which provides that as identified in K.S.A. 21-3502, 21-3404, 21-3506, 21-3513 and 21-3516 and K.S.A. 2005 Supp. 21-3447, and amendments thereto, if the offender is 18 years of age or older and the victim is under 14 years of age, such violations are off-grid crimes for the purposes of sentencing. Except as provided in section 1, and amendments thereto, the sentence shall be imprisonment for life pursuant to section 2, and amendments thereto.

K.S.A. 2005 Supp. 22-3717(a) (Parole) is amended to exempt offenders sentenced as aggravated habitual sex offenders from eligibility for parole or good time.

Subsections (b) and (c) are amended to provide that inmates sentenced to a Hard 25, Hard 40 or mandatory guidelines sentence pursuant to section 2 shall be eligible for parole only after serving the mandatory term without the application of any good time credits.

Subsection (d) is amended to provide, in part, that offenders convicted of Indecent solicitation of a child and aggravated indecent solicitation of a child shall be required to participate in a treatment program for sex offenders during the postrelease supervision period. Subparagraph (G) is added and provides that, except as provided in subsection (u), persons convicted of a sexually violent crime, committed on or after July 1, 2006, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life. As used in this section, "sexually violent crime" includes: Rape, Indecent liberties with a child, Aggravated indecent liberties with a child, Criminal sodomy, Aggravated criminal sodomy, Indecent solicitation of a child, Aggravated indecent solicitation of a child, Sexual exploitation of a child, Aggravated sexual battery, Aggravated incest, and an attempt, conspiracy or criminal solicitation of any of the above.

Subsection (u) is added to provide that an inmate sentenced to imprisonment pursuant to section 2, and amendments thereto, for crimes committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Kansas parole board. When the board orders the parole of an inmate pursuant to this subsection, the board shall order as a condition of parole that the inmate be electronically monitored for the duration of the inmate's natural life.

Subsection (v) is also added and provides that whenever the Kansas parole board or the court orders a person to be electronically monitored, the board or court shall order the person to reimburse the state for all or part of the cost of such monitoring. In determining the amount and method of payment of such sum, the board or court shall take account of the financial resources of the person and the nature of the burden that the payment of such sum will impose.

K.S.A. 2005 Supp. 22-4903 (Offender registration) is amended to increase the penalty for failing to register as required under the Kansas Offender Registration Act to a severity level 5, person felony. Each 31st consecutive day in violation shall constitute a new and separate offense.

K.S.A. 2005 Supp. 21-3412a (Domestic battery) is amended to provide that if the offender does not enter into and complete a treatment program for domestic violence, required as a condition of parole for a felony conviction of domestic battery, such person shall serve not less than 180 days nor more than one year's imprisonment. Subparagraph (E) is added to provide that a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section or an ordinance of any city or resolution of any county which prohibits the acts that this section prohibits only twice during any three-year period.

** Effective upon publication in the statute book.*

House Bill 2703

New Section 1 Creates the nuclear generating facility security guard act.

New Section 3 Creates the crime of criminal trespass on a nuclear generating facility, a severity level 6, person felony, defined as either:

- Knowingly entering or remaining unlawfully in or on a nuclear generating facility; or
- Knowingly entering or remaining unlawfully within a structure or fenced yard of a nuclear generating facility.

K.S.A. 2005 Supp. 21-3721 (Criminal trespass) is amended to exempt criminal trespass on a nuclear generating facility from application of provisions of this statute.

** Effective upon publication in the statute book.*

House Bill 2748

K.S.A. 8-1602 (Vehicle accidents involving death or personal injury) is amended to provide stepped up penalties for failing to remain at the scene of an accident resulting in injury, great bodily harm or death.

Failure of driver involved in vehicle accident to remain at the scene of the accident when such accident results in:	Severity Level	F / M	P / NP
Injury to any person	A	M	P
Great bodily harm to any person	10	F	P
Death of any person	9	F	P

K.S.A. 2005 Supp. 8-1606 (Vehicle accidents – Duty to report) is amended to provide stepped up penalties for failing to report an accident resulting in injury, great bodily harm, death or property damage.

Failure of driver involved in vehicle accident to report the accident to authorities when such accident results in:	Severity Level	F / M	P / NP
Injury to any person or property damage in excess of \$1,000	A	M	P
Great bodily harm to any person	10	F	P
Death of any person	9	F	P

* If a driver is physically incapable of report such accident and there is an occupant 18 or older capable of providing notice, such occupant assumes the duty to report the accident.

** Effective upon publication in the statute book.*

House Bill 2833

K.S.A. 47-834 (Veterinary registration requirement) is amended to create two new class B nonperson misdemeanors for the:

- Unlawful practice of veterinary medicine which is defined as the practice of veterinary medicine by a person without a license, unless exempt; and
- Unlawful operation or management of veterinary premises which is defined as the operation or management by a person of a veterinary premises that is not registered pursuant to K.S.A. 47-840, and amendments thereto.

** Effective upon publication in the statute book.*

House Bill 2874

New Section 1 Provides that K.S.A. 9-508 through 9-513 shall be known as the Kansas money transmitter act.

K.S.A. 9-512 (Banks & Banking; Penalties) is amended to change the penalty for a violation from an unclassified misdemeanor **to** a severity level 9, nonperson felony for any person who *knowingly* violates any provision of this act.

** Effective upon publication in the statute book.*

House Bill 2893

New Section 3 Creates a new crime of obstruction of a Medicaid fraud investigation which is defined as knowingly and intentionally engaging in one or more of the following during an investigation of any matter pursuant to K.S.A. 21-3844 *et. seq.*, and amendments thereto:

1. Falsifying, concealing or covering up a material fact by any trick, misstatement, scheme or device;
or
2. making or causing to be made any materially false writing or document knowing that such writing or document contains any false, fictitious or fraudulent statement or entry.

Obstruction of a Medicaid fraud investigation is a severity level 9, nonperson felony.

K.S.A. 2005 Supp. 21-3847(a) (Unlawful acts related to Medicaid) is amended to add subparagraph (3) which provides that it is a violation of this section for any *recipient of Medicaid benefits*, family member of such *recipient or provider of Medicaid services* to *knowingly divide or share any funds illegally obtained from the Medicaid program*. A violation of this subsection is a severity level 7, nonperson felony.

Subsection (b) is added and provides that no Medicaid recipient shall knowingly and intentionally trade a Medicaid number for money or other remuneration, sign for services that are not received by the Medicaid recipient or sell or exchange for value goods purchased or provided under the Medicaid program. A violation of this subsection is a severity level 7, nonperson felony.

K.S.A. 21-3910 (Misuse of public funds) is amended to provide stepped up penalties for violations of the statute. Misuse of Public funds is *knowingly* using, lending or permitting another to use; public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such person's official position.

Misuse of public funds where the aggregate amount of money paid or claimed in violation of this section is:	Severity Level	F / M	P / NP
\$100,000 or more	6	F	NP
At least \$25,000 but less than \$100,000	7	F	NP
At least \$1,000 but less than \$25,000	9	F	NP
Less than \$1,000	A	M	NP

** Effective upon publication in the statute book.*

House Bill 2916

K.S.A. 8-2,144 (Commercial motor vehicles; DUI) is amended to provide stepped up penalties for subsequent violations involving driving a commercial motor vehicle under the influence of alcohol.

Conviction for violation	Sentence	Severity Level	F / M	P / NP
First conviction	48 hours – 6 month’s imprisonment, or 100 hours public service, and a fine of no less than \$500 to \$1,000	B	M	NP
Second conviction	90 days (five mandatory) to 1 year’s imprisonment and a fine of no less than \$1,000 to \$1,500	A	M	NP
Third conviction	90 days (mandatory) – 1 year’s imprisonment and a fine of no less than \$1,500 to \$2,500	*Unc/10	F	NP

* Unclassified felony sentenced according to provisions in this statute, counted as severity level 10, nonperson felony for criminal history purposes. K.S.A. 21-4707.

K.S.A. 2005 Supp. 21-3610c(b) (Unlawfully hosting minors) is amended to increase the penalty for unlawfully hosting minors consuming alcoholic liquor or cereal malt beverages to a **class A** person misdemeanor with a fine of no less than \$1,000.

** Effective upon publication in the statute book.*

TIME LINE OF SELECTED EVENTS RELATED TO THE KSGA

July 1, 1993

The Kansas Sentencing Guidelines Act (KSGA), at K.S.A. 21-4701 *et seq.*, became law.

March 24, 1994

The limited retroactivity provision of the KSGA found at K.S.A. 1993 Supp. 22-3717(f) was repealed. On March 24, 1994, K.S.A. 1993 Supp. 22-3717(f) was amended so that pre-guideline sentences would not be converted if new crimes were committed while an offender was on parole. This provision had allowed offenders on parole from an indeterminate sentence(s) to have their indeterminate sentence(s) converted to a determinate sentence under the KSGA, if they were convicted of a new crime while out on parole.

K.S.A. 1993 Supp. 21-4603d (Authorized dispositions) and 22-3717 (Parole or postrelease) were amended to eliminate the requirement that felony probation, parole, postrelease supervision, community corrections, or conditional release must be revoked due to a new conviction for a crime committed on one of these statutes and before a nondeparture term of imprisonment may be imposed for the new conviction, if a nonprison sanction is otherwise the presumed sentencing disposition.

July 1, 1994

K.S.A. 1993 Supp. 21-4704 (Sentencing guidelines, nondrug grid) was amended to provide that Felony Driving Under Influence (DUI) offenses committed on or after this date are nongrid crimes with no guidelines severity level. The sentencing for such offenses is to be governed exclusively by the penalty provisions of K.S.A. 1994 Supp. 8-1567. Thus a felony DUI conviction can no longer result in a state prison sentence.

K.S.A. 1993 Supp. 21-4704 was further amended to double the presumptive durations of sentences for crimes committed on or after this date for cases which fall in severity levels 1 thru 5 on the nondrug grid and within criminal history categories A and B.

April 20, 1995

K.S.A. 1994 Supp. 21-4706 (Sentencing) and 21-4722 (Good time credit) were amended. For crimes committed on or after this date, inmates can earn only 15% “good time” credit by which the prison portion of their guidelines sentence can be reduced. Prior to this date an inmate could earn up to a 20% reduction for “good time.”

K.S.A. 1994 Supp. 75-5217 (Violation of conditions of release) was amended. For crimes committed on or after this date, the term of imprisonment for technical violations of the conditions of postrelease supervision will be 180 days, subject to a reduction of up to 90 days for good behavior.

K.S.A. 1994 Supp. 22-3717 (Parole or postrelease) was amended. For crimes committed on or after this date, the postrelease supervision term for crimes in nondrug severity levels 1 thru 6 and drug severity levels 1 thru 3, will be 36 months; the term for crimes in nondrug severity levels 7 thru 10 and drug severity level 4, will be 24 months. The postrelease term can be reduced by up to 12 months for good behavior.

July 1, 1996

K.S.A. 21-4714 (Presentence Investigation Report), 22-3426 (Record of Judgment), and 22-3426a (Revocation of Probation), were amended to provide that all Presentence Investigation Report, Journal Entry of Judgment and Journal Entry of Probation Revocation Hearing forms are required to be on a form approved by the Kansas Sentencing Commission.

K.S.A. 21-4704 (Sentencing guidelines, nondrug grid) was amended to double the presumptive sentence lengths for all nondrug grid severity level 1 and 2 crimes. “Border Boxes” were added to the drug grid at levels 3-E, 3-F, 3-G, 3-H, 3-I, 4-E and 4-F.

K.S.A. 21-4705 (Sentencing guidelines, drug grid) subsection (c) the pre-guidelines sentence conversion provision, commonly referred to as the “small sale of marijuana exception” was repealed.

May 29, 1997

K.S.A. 1996 Supp. 21-4705(c) (Sentencing guidelines, drug grid) was amended and the sentencing court is prohibited from distinguishing between cocaine base (904 1 L000) and cocaine hydrochloride (904 1 L005), when sentencing within the sentencing range of the grid block.

July 1, 1998

K.S.A. 1997 Supp. 22-3717 (Parole or postrelease) was amended to require that the conviction carrying the longest postrelease supervision period takes precedence when deciding which postrelease term will be controlling in a multiple conviction case. The 60 months postrelease term for sex crimes may be imposed in a multiple conviction case, even though the sex crime may not have been the crime with the highest severity level.

K.S.A. 1997 Supp. 21-4603d(a) (Authorized dispositions) was amended. Prior to imposing a dispositional departure for an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid; or prior to the sentencing of an offender to incarceration whose offense is classified in grid blocks 5-H, 5-I, or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, 4-E or 4-F of the sentencing guidelines grid for drug crimes; or prior to the revocation of a nonprison sanction of an offender whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, 3-I, 4-E or 4-F of the sentencing guidelines grid for drug crimes, the sentencing court shall consider placement of the offender in the Labette Correctional Conservation Camp, conservation camps established by the Kansas Secretary of Corrections pursuant to K.S.A. 75-52,127 and amendments thereto, or to a community intermediate sanction center.

Pursuant to this statute, the offender shall not be sentenced to imprisonment if space is available in a conservation camp, or to a community intermediate sanction center and the offender meets all the conservation camp’s or the community intermediate sanction center’s placement criteria, unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center.

July 1, 1999

K.S.A. 1998 Supp. 8-262(a)(1)(C) (Driving while license canceled, suspended or revoked) was amended to eliminate the felony provision for a third or subsequent conviction for driving on a suspended license. Hereafter a second or subsequent conviction for driving while suspended under K.S.A. 8-262 will be a class A nonperson misdemeanor.

K.S.A. 1998 Supp. 8-287 (Habitual Violator) was amended to change the penalty from a severity level 9 nonperson felony to a class A nonperson misdemeanor.

K.S.A. 1998 Supp. 21-3402(a) (Intentional murder in the second degree) was amended to move it from an off-grid (Hard 10) offense to a nondrug grid severity level 1 person felony.

K.S.A. 1998 Supp. 21-4603d(a) (Authorized dispositions) was further amended to create a new special sentencing rule that provides the sentencing court with the discretion to sentence an offender to imprisonment for a new conviction committed while the offender was on felony bond, even if the offender's new crime and criminal history classification would otherwise presume a nonprison sentence. Further, a decision by the sentencing court to order an imprisonment sentence in this type of case does not constitute a departure.

K.S.A. 21-4638 (Mandatory 40 or 50 years imprisonment) was likewise amended to allow for the sentence length increase from the "Hard 40" to the "Hard 50." This amended statute makes it clear that a person sentenced to the "Hard 50" shall not be eligible for parole prior to serving 50 years imprisonment, and such 50 years imprisonment shall not be reduced by the application of good time credits.

K.S.A. 1998 Supp. 21-4704 (Sentencing guidelines, nondrug grid) was amended and important changes include: (1) The presumptive sentence lengths for crimes committed on or after July 1, 1999, which have sentences on severity levels 1 and 2 of the nondrug grid are decreased by 20 percent; (2) the presumptive sentence lengths for crimes committed on or after July 1, 1999, which have sentences on severity level 3 of the nondrug grid are increased by 20 percent; (3) subsection (i) of the statute is amended to clarify that sentences for felony domestic battery [K.S.A. 21-3412(c)(3)], shall not be served in a state facility in the custody of the secretary of corrections; and (4) a new subsection (l) is added to the statute which creates a new special sentencing rule requiring that a sentence for the commission of the burglary of a residence, [K.S.A. 21-3715(a)], shall be presumed imprisonment if the person being sentenced has a prior conviction for burglary of a residence, or a non-residence under subsections (a) or (b) of K.S.A. 21-3715, or a prior conviction for aggravated burglary under K.S.A. 21-3716.

K.S.A. 1998 Supp. 21-4711(a) (Criminal history classification) which contains the criminal history aggregation factor for prior convictions for assault, or juvenile adjudications for assault, was amended to clarify that "every three prior adult convictions or juvenile adjudications of assault as defined by K.S.A. 21-3408 and amendments thereto, occurring within a period *commencing* three years *prior to the date of conviction for the current crime of conviction* shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes."

K.S.A. 1998 Supp. 22-3717(b)(2) (Parole or postrelease) was amended to increase the length of the off-grid 15 years "life" sentence to 20 years before an offender was eligible for parole for qualifying crimes committed on or after July 1, 1999. Subsection (b)(3) of K.S.A. 1998 Supp. 22-3711 was also amended, for the purpose of specifying that the prior off-grid "Hard 10" life sentence for intentional second degree murder shall not apply to crimes committed on or after July 1, 1999.

K.S.A. 21-3522 created the crime of Unlawful Voluntary Sexual Relations, a.k.a. the “Romeo and Juliet” statute. Under this statute, unlawful voluntary sexual relations is engaging in voluntary sexual intercourse, sodomy, or lewd fondling or touching with a child who is 14 years of age but less than 16 years of age when the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and of the opposite sex. Pursuant to this statute, unlawful voluntary sexual relations involving sexual intercourse is a severity level 8 person felony, unlawful voluntary sexual relations involving sodomy is a severity level 9 person felony and unlawful voluntary sexual relations involving lewd fondling or touching is a severity level 10 person felony.

NOTE: K.S.A. 21-3522 (Unlawful voluntary sexual relations) is not listed as a crime requiring registration under the Kansas Offender Registration Act at K.S.A. 22-4902.

K.S.A. 1998 Supp. 65-4159(b) (Unlawful manufacturing) was amended to provide that a violation of the prohibition against the manufacture of a controlled substance shall be a drug grid severity level 1 felony. Previously a first conviction under K.S.A. 1998 Supp. 65-4159 was a drug grid severity level 2 felony, and a second or subsequent conviction carried a drug grid severity level 1 penalty.

K.S.A. 1998 Supp. 21-4705 (Sentencing guidelines, drug grid) was amended by the addition of a new subsection (e) that created a special rule for the sentencing of second or subsequent convictions for the manufacture of a controlled substance under K.S.A. 65-4159. Under this special sentencing rule a second or subsequent violation would be a drug grid severity level 1 offense, but the sentencing court would be required to double the presumptive sentence length. However, the special rule permits the sentencing court to order a reduction of not to exceed 50 percent of the mandatory sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the allowed reduction would not be considered a departure and would not be subject to appeal.

April 6, 2000

K.S.A. 1999 Supp. 75-5217 (Violation of condition of release) was amended to add language at subsection (d) of the statute to state that if a violation of postrelease supervision “results from a conviction for a new misdemeanor, upon revocation, the inmate shall serve a period of confinement, to be determined by the Kansas parole board, which shall not exceed the remaining balance of the period of postrelease supervision.”

May 25, 2000

House Substitute for Senate Bill 323

K.S.A. 1999 Supp. 21-4603 (Authorized dispositions, crimes before July 1, 1993) was amended to increase the amount of time an offender could be sentenced to county jail as a condition of an original probation was increased from the current 30 days to 60 days. In addition, an offender could also be sentenced to 60 days jail time for each probation revocation. *The increase in county jail time was not retroactive.*

K.S.A. 22-3716(b) (Violation of probation conditions, revocation) was amended to provide that condition probation violators were required to be placed in a Community Corrections program at least once prior to a revocation resulting in an offender’s placement in a state correctional facility. However, a public safety exception was included which would authorize direct placement in a state correctional facility if the court finds and sets forth with particularity the reasons for finding the safety of the members of the public will be jeopardized or the welfare of the inmate will not be served by assignment to community correctional services. *The provision requiring mandatory placement in Community Corrections was not retroactive.*

Subsection (e) was added to provide that condition probation violators who were subject to a probation revocation that resulted in the imposition of the underlying prison sentence to be served in a state correctional facility, would not be placed on a period of postrelease supervision upon their release from prison. Exceptions to this provision include:

1. An offender sentenced to a nonprison sanction pursuant to a dispositional departure.
2. An offender sentenced to a nonprison sanction and whose offense falls within a border box of either sentencing grid.
3. An offender sentenced to for a sexually violent offense as defined in K.S.A. 22-3717.
4. An offender whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense.
5. Offenders who are serving or are to begin serving a sentence for any other felony offense that is not excluded from postrelease supervision by this subsection on the effective date of this subsection.

This provision was to be applied retroactively to any offender sentenced under the Kansas Sentencing Guidelines Act and the Kansas Department of Corrections was to discharge all eligible offenders from postrelease supervision by September 1, 2000.

K.S.A. 1999 Supp. 21-4611 (Probation duration) was amended to provide the recommended length of probation as follows:

Severity Levels	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	18	12	12
Drug	36	36	18	12	N/A	N/A	N/A	N/A	N/A	N/A

* Recommended probation length in months; amended terms in italics.

In addition, a public safety provision was added which provides the court with the discretion to impose a longer probation period, if it sets forth with particularity the reasons for finding that the safety of the public will be jeopardized or that the welfare of the inmate will not be served by the length of the probation terms as provided. Such an increase is not considered a departure nor is it subject to appeal.

This change in probation terms was to be applied retroactively and the deadline for all conversions or modifications to prior probation sentences was September 1, 2000.

K.S.A. 1999 Supp. 22-3717 (Parole or postrelease) was amended to provide the length of postrelease supervision as follows:

Severity Levels	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	24	24	12	12	12	12
Drug	36	36	24	12	N/A	N/A	N/A	N/A	N/A	N/A

* Mandatory postrelease supervision length in months; amended terms in italics.

These terms are mandatory unless the judge finds substantial and compelling reasons to impose a departure and states such on the record at the time of sentencing. The modified periods of postrelease supervision were eligible for the same good time reduction in supervision periods as set forth in the current statute.

This change in postrelease supervision terms was to be applied retroactively with conversions completed pursuant to the phase-in implementation schedule provided. All conversions were to be completed by January 1, 2001.

K.S.A. 1999 Supp. 75-5291 (Community correctional services) was amended to define the target offender population for Community Corrections programs. Adult offenders convicted of felony offenses who met one of the following criteria were to be eligible for placement in Community Corrections:

- Offenders whose sentence fell within the designated border boxes on both the drug and nondrug sentencing grids;
- Offenders whose sentence fell within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
- Offenders whose severity level and criminal history classification designated a presumptive prison sentence but received a nonprison sentence as the result of a dispositional departure;
- Offenders who received a nonprison sentence and were convicted of a severity level 7 or higher sex offense as defined in K.S.A. 22-4902, regardless of the manner in which the sentence was imposed;
- Any offender who violated conditions of release, or assignment, or a presumptive nonprison sentence prior to revocation to a state correctional facility;
- Any offender determined to be high risk or needs, or both by the use of a statewide mandatory standardized risk assessment tool, or instrument validated for Community Corrections placement; (A validated risk assessment tool would be provided by the Kansas Department of Corrections); or
- Any offender who successfully completed an assignment to a conservation camp program.

Subsection (a)(3) was added to provide that juvenile offenders may be placed in Community Corrections programs if the local Community Corrections Advisory Board approves, however, grants from the Community Corrections Fund administered by the Kansas Secretary of Corrections shall not be used for this service.

Subsection (a)(4) was added to provide that the court may require an offender for whom a violation of a condition of release or assignment or a nonprison sanction has been established pursuant to K.S.A. 22-3716, to be placed directly in the custody of secretary of corrections without prior assignment to community correctional services program if the court finds and sets forth with particularity the reasons for finding the safety of the members of the public will be jeopardized or the welfare of the inmate will not be served by such assignment to community correctional services.

The provisions herein were not retroactive.

July 1, 2000

K.S.A. 1999 Supp. 21-4720(b) (Sentencing multiple convictions) was amended for situations where an offender was convicted and sentenced in a multiple conviction case, then the primary crime of conviction was reversed on appeal, but other convictions in the case are affirmed. In such a case the appellate court was to remand the case for resentencing and the sentencing court would assign a new primary crime, use the offender's full criminal history score for that primary crime and resentence the offender. A new aggravating departure factor was created for the nondrug grid (K.S.A. 21-4716) for those cases where "the defendant was incarcerated during the commission of the offense." A new aggravating departure factor was created for the drug grid (K.S.A. 21-4717) for those cases where "the offender was incarcerated during the commission of the offense."

July 1, 2001

K.S.A. 2000 Supp. 8-1567 (Driving under the influence) was amended to make fourth and subsequent DUI convictions subject to a sentence of from 90 days to 1 year in a county jail, with the jail portion of 72 hours being mandatory incarceration, the remainder of the 90 days eligible for a work release program. After serving this sentence, an offender would be placed in a treatment program under the custody of the Secretary of the Kansas Department of Corrections (KDOC). Upon completion of the treatment program, an offender would be placed in an after care program approved by the Kansas Parole

Board for a period of 12 months. *An offender who violates the conditions of the aftercare program is treated as a condition violator and subject to imprisonment in a KDOC facility for up to 6 months.*

The 5 year “decay” rule limiting an offender’s DUI convictions to only those which occurred within the past 5 years as counting for an offender’s first, second or third offense was deleted. *All prior DUI convictions are to be included and there was no provision for retroactivity.* K.S.A. 21-4711 was amended to include DUI convictions and diversion agreements from other states, and also includes convictions under city ordinances and county resolutions as violations of the DUI statute for criminal history scoring under the Kansas Sentencing Guidelines Act.

May 2, 2002

K.S.A. 21-3419 (Criminal threat) was amended to modify the present severity level 9 nonperson felony offense to also include threats made to endanger the food supply. It also created the crime of endangering the food supply, which includes: a new class A nonperson misdemeanor offense; a new severity level 4 nonperson felony offense if the crime involves foot-and-mouth disease; a new severity level 3 nonperson felony offense if the crime is done with the intent to cause damage to plants or animals, or to cause economic harm or social unrest; and a new severity level 3 person felony offense if the crime is done with the intent to cause illness, injury, or death to a human being.

May 23, 2002

K.S.A. 40-5001 through 40-5016 created the Viatical Settlement Act of 2002. K.S.A. 40-5013 provides the penalties for violations of this act and provides differing crime categories depending on the amount involved.

Value of Viatical Settlement Contract	Severity Level	F / M	P / NP
\$25,000 or more.	7	F	NP
At least \$500 but less than \$25,000.	9	F	NP
Less than \$500.	A	M	NP
If value of insurance premium is less than \$500 and such agent or broker has two or more prior convictions for violating this section within five years immediately preceding commission of current crime.	9	F	NP

* Penalties for violations may include monetary penalties, suspension or revocation of license or certificate or an order to cease and desist from the unlawful act or practice and take affirmative action to carry out the purposes of the violated provisions.

K.S.A. 2001 Supp. 21-3718 (Arson) was amended to create a new severity level 7 person felony offense for “accidentally, by means of fire or explosive as a result of manufacturing or attempting to manufacture a controlled substance in violation of K.S.A. 65-4159, and amendments thereto, damaging any building or property which is a dwelling.” In addition, it created a new severity level 7 nonperson felony offense for “accidentally, by means of fire or explosive as a result of manufacturing or attempting to manufacture a controlled substance in violation of K.S.A. 65-4159, and amendments thereto, damaging any building or property which is not a dwelling.”

K.S.A. 21-3766 created the crime of tampering with a pipeline. Under this statute, tampering with a pipeline, including but not limited to, any intentional unauthorized adjustment, opening, removal, change or destruction of any part of any pipeline, is a severity level 6 nonperson felony.

K.S.A. 8-1567 (DUI) was amended to create the offense of driving under the influence of an “inhalant.” In addition, “toxic vapors” was added to the definition of “drugs” under the DUI statute so that a DUI offense may be prosecuted for driving under the influence of toxic vapors.

K.S.A. 2001 Supp. 21-3520 (Unlawful sexual relations) was amended to expand the definition of unlawful sexual relations to include employees of a contractor that provides supervision services for persons on parole, conditional release, or post release supervision. This added an additional group of potential offenders to the severity level 10 person felony offense under this statute.

K.S.A. 2001 Supp. 21-3438 (Stalking) was amended in subsection (b) to provide that any person who violates this statute when there is a Protection from Stalking Order, a temporary restraining order, or an injunction is in effect against the same person, is guilty of a severity level 9 person felony offense. Subsection (c) was amended to provide that a second or subsequent conviction of a violation of this statute, within seven years of a prior conviction involving the same victim, is a severity level 8 person felony.

July 1, 2003 2003 Senate Bill 123

K.S.A. 21-4729 (Nonprison sanction, certified drug abuse treatment) was created by 2003 Senate Bill 123. The goal of certified drug abuse treatment is to provide community based punishment and the opportunity for treatment to nonviolent adult offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders. Sentences under K.S.A. 21-4729 result in a drug severity level 4 conviction and require the offender to participate in a certified drug abuse treatment program under the supervision of community corrections. The sentencing court shall commit the offender to treatment until determined suitable for discharge by the court but the term of treatment shall not exceed 18 months.

K.S.A. 21-4729(a) provides the eligibility requirements for this nonprison sanction. Eligible offenders are a defined target population of nonviolent adult offenders convicted of K.S.A. 65-4160 or 65-4162 with no prior convictions of drug trafficking, drug manufacturing or drug possession with intent to sell. Placement in treatment can be mandatory or by court finding that the safety of the public will not be jeopardized by such placement.

A. **Mandatory placement** in a certified drug abuse treatment program is for adult offenders sentenced in the 4-E, 4-F, 4-G, 4-H, or 4-I (presumptive probation) blocks of the drug grid, with no prior conviction of:

- K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute);
- K.S.A. 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute);
- K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute);
- K.S.A. 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute);
- K.S.A. 65-4164 (the unlawful acts relating to certain narcotic drugs statute); or
- Any similar offenses from another jurisdiction.

- B. **Certified drug abuse treatment with court finding** is for adult offenders sentenced in the 4-A, 4-B, 4-C, or 4-D (presumptive prison) blocks of the drug grid, with no prior conviction of:
- K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute);
 - K.S.A. 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute);
 - K.S.A. 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute);
 - K.S.A. 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute);
 - K.S.A. 65-4164 (the unlawful acts relating to certain narcotic drugs statute); or
 - Any similar offenses from another jurisdiction; and
 - If such person felonies committed by the offender were severity level 8, 9 or 10 or nongrid offenses and the sentencing court finds and sets forth with particularity, the reasons for finding that the safety of the members of the public will not be jeopardized by placement of the offender in a certified drug abuse treatment program..
- C. Offenders with prior convictions for drug possession are eligible.

K.S.A. 21-4729(b) was created and K.S.A. 2002 Supp. 21-4714 was amended to require that, as part of the presentence investigation, all offenders who meet the requirements of K.S.A. 21-4729 (2003 Senate Bill 123) shall be subject to a drug abuse assessment to assess the offender's risk of re-offending and the level of their substance abuse problem. The drug abuse assessment shall include a statewide, mandatory, standardized risk assessment tool and an instrument validated for drug abuse treatment program placements and shall include a clinical interview with a mental health professional.

K.S.A. 21-4729(f) provides for offender accountability. Offenders shall be discharged from treatment if the offender is convicted of a new felony other than a conviction of K.S.A. 65-4160 or 65-4162 or the offender has a pattern of intentional conduct demonstrating the offender's refusal to comply with or to participate in the treatment program, as established by a judicial finding. An offender whose probation is revoked shall be subject to the revocation provisions of K.S.A. 21-4603d(n).

K.S.A. 21-4603d(n) provides that if the offender fails to participate in or has a pattern of intentional conduct that demonstrates refusal to comply with or participate in the treatment program as established by judicial finding, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 21-4705. Offenders who are revoked from certified treatment violate conditions of probation, i.e. the certified drug abuse treatment program, and thus may be subject to additional nonprison sanctions pursuant to K.S.A. 22-3716(f). Such nonprison sanctions include but are not limited to: up to 60 days in a county jail, fines, community service, intensified treatment, house arrest and electronic monitoring.

K.S.A. 75-52,144 was created to provide the Certified drug abuse treatment program requirements. Certified drug abuse treatment programs are required to provide one or more treatment options in the continuum of services needed to reach recovery. Certified drug abuse treatment programs include a full cognitive based curriculum in addition to or as part of treatment and may include community based or faith based programs. The state-wide comprehensive drug treatment delivery system includes a continuum of services that allows the offender to move up or down the continuum as the recovery process requires. Regardless of the level of substance abuse treatment assessed, all treatment plans will include an aftercare component.

It may be necessary for residential placements to be outside of an offender's local community especially in rural areas, given the current limited number of facilities available and their geographic locations.

Treatment providers are required to obtain Kansas Department of Corrections (KDOC) certification in addition to any other state licensing or certification required to provide drug and alcohol abuse treatment. KDOC counselor certification is based on case management, cognitive behavior tool skills acquisition and facilitation ability.

Noted sentencing policy changes - Mandatory drug abuse treatment in lieu of incarceration resulted in several changes in sentencing practices for offenders convicted of drug possession. These changes focus on various levels of treatment options, establishment of certain and immediate sanctions for continued drug usage, and a comprehensive continuum of sanctions that include offender accountability, while ensuring public safety. Since this is a post conviction sentencing policy, all convictions under K.S.A. 21-4729 (2003 Senate Bill 123) result in a felony conviction. Current sentencing practices and procedures are:

- All "pure" felony drug possession convictions are sentenced on severity level 4 of the drug grid.
- Adult offenders with current possession convictions, criminal history 4-E to 4-I (presumptive probation blocks) of the drug grid, with no prior convictions of drug trafficking, drug manufacture or drug possession with intent to sell receive mandatory certified drug abuse treatment. K.S.A. 2003 Supp. 21-4729(a)(1).
- Adult offenders with current possession convictions, criminal history 4-A to 4-D (presumptive prison blocks) of the drug grid, with no prior convictions of drug trafficking, drug manufacture or drug possession with intent to sell are eligible for certified drug abuse treatment if the court finds that the placement of these offenders in a certified drug abuse treatment program will not jeopardize public safety. The prior person felony convictions can only be severity level 8, 9, or 10 or nongrid offenses. K.S.A. 2003 Supp. 21-4729(a)(2).
- An offender with a third or subsequent drug possession conviction who has previously completed at least one prior 18 month certified drug abuse treatment program or has been discharged from or refused to participate in such program shall be sentenced to a presumptive term of imprisonment as provided in the guidelines. K.S.A. 2003 Supp. 21-4705(f).
- Mandatory participation in a certified drug abuse treatment program for offenders sentenced under K.S.A. 21- 4729 (2003 Senate Bill 123) is for a term of up to 18 months. K.S.A. 2003 Supp. 21-4729(c).
- Upon successful completion of a certified drug abuse treatment program, the offender will be discharged and not subject to a period of postrelease supervision. K.S.A. 21-4603d(n).
- K.S.A. 21-4729 (2003 Senate Bill 123) applies to offender with offenses committed on or after November 1, 2003, and is not applied retroactively. K.S.A. 21-4729(a).

July 1, 2004

K.S.A. 2003 Supp. 21-4635 (Mandatory 40 years, 50 years or life imprisonment) was amended to create the new sentence of life imprisonment without the possibility of parole. A defendant convicted of capital murder, pursuant to K.S.A. 21-3439, and amendments thereto, where a sentence of death is not imposed, will be sentenced to life imprisonment without the possibility of parole. A defendant sentenced to life imprisonment without the possibility of parole is not eligible for parole, probation, assignment to a community correctional service program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence. The sentence of death or life imprisonment without the possibility of parole does not apply to juveniles or those determined to be mentally retarded.

K.S.A. 22-5101 created the Kansas Criminal Justice Recodification, Rehabilitation, and Restoration Project (3 R's Committee). This project is designed to recodify the criminal code, identify ways to rehabilitate offenders and work with offenders on community based supervision, and identify ways to restore offenders back into society as productive members.

K.S.A. 21-3608a created the crime of aggravated endangering a child, a severity level 9 person felony. Aggravated endangering a child is:

- (1) Intentionally and recklessly causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health is injured or endangered;
- (2) Permitting such child to be in an environment where a person is selling, offering for sale or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture or attempt to manufacture any methamphetamine as defined by subsection (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto; or
- (3) Permitting such child to be in an environment where drug paraphernalia or volatile, toxic or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture any methamphetamine as defined by subsection (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto.

K.S.A. 2003 Supp. 21-3701 (Theft) and K.S.A. 21-3704 (Theft of services) were amended to increase the threshold for a class A nonperson misdemeanor was raised from \$500 to \$1,000.

June 1, 2005

K.S.A. 65-1643 (Registration of Pharmacists; certain acts declared unlawful) was amended to add subsections (k) and (l).

Subsection (k) provides that it is unlawful for any person to sell or distribute in a pharmacy a controlled substances designated in subsection (e) or (f) of K.S.A. 65-4113 (Substances included in schedule V) unless: (1)(A) such controlled substance is sold or distributed by a licensed pharmacist, a registered pharmacy technician or a pharmacy intern or clerk supervised by a licensed pharmacist; and (B) any person receiving, purchasing or otherwise acquiring any such controlled substance produces a photo identification showing their date of birth and signs a log. The log or database must be available for inspection during regular business hours to the board of pharmacy or any law enforcement officer; or (2) there is a lawful prescription.

Subsection (l) provides that it is unlawful for any person to sell or distribute in a pharmacy four or more packages or containers of any controlled substance designated in subsection (e) or (f) of K.S.A. 65-4113 to a specific customer within any seven-day period. Violation is a misdemeanor.

July 1, 2005

K.S.A. 2004 Supp. 12-189 (Confidentiality of retailer sales tax information) was amended to change the penalty from a class B misdemeanor to a class A misdemeanor.

K.S.A. 2004 Supp. 75-5133(d) (Unlawful to divulge licensure, registration and tax information) was amended to change the penalty for a violation of this section from a class B nonperson misdemeanor to a class A nonperson misdemeanor.

K.S.A. 2004 Supp. 79-3234(e) (Tax information; preservation; limits on dissemination and use) was amended to change the penalty for any violation of subsection (b) or (c) from a class B nonperson misdemeanor to a class A nonperson misdemeanor.

K.S.A. 32-1061 through 32-1066 created the wildlife violator compact. It shall be unlawful for any person whose license, privilege, or right to hunt, fish, trap, possess, or transport wildlife, having been suspended or revoked pursuant to the wildlife violator compact, to exercise that right or privilege within this state or to purchase or possess such a license which grants such right or privilege. A person who knowingly violates this section shall be guilty of a class A nonperson misdemeanor and subject to a fine and further restrictions on such persons privileges or rights as described herein. K.S.A. 32-1063.

K.S.A. 2004 Supp. 21-3707 (Giving a worthless check) was amended in subsection (e) to change the penalty portion of the statute.

Description	Severity Level	F / M	P / NP
Giving worthless check \$25,000 or more.	7	F	NP
<i>Giving worthless check more than once in 7 days and combined total is \$25,000 or more.</i>	7	<i>F</i>	<i>NP</i>
Giving worthless check at least \$1,000 but less than \$25,000.	9	F	NP
<i>Giving worthless check more than once in 7 days and combined total is at least \$1,000 but less than \$25,000.</i>	9	<i>F</i>	<i>NP</i>
Giving worthless check less than \$1,000.	A	M	NP
Giving worthless check less than \$1,000 if committed by a person who has two or more prior convictions for giving a worthless check within five years immediately preceding commission of current crime.	9	F	NP

* Changes noted in italics.

K.S.A. 21-3446 created the crime of Trafficking; (1) Recruiting, harboring, transporting, providing or obtaining, by any means, another person knowing that force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude; or (2) benefiting financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in subsection (a)(1). Trafficking is a severity level 2 person felony.

K.S.A. 21-3447 created the crime of Aggravated trafficking which is: (1) trafficking as defined in K.S.A. 2005 Supp. 21-3446; (A) involving the commission or attempted commission of kidnapping as defined in K.S.A. 21-3420, (B) committed in whole or in part for the purpose of the sexual gratification of the defendant or another, or (C) resulting in a death; or (2) recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another. Aggravated trafficking is a severity level 1 person felony.

K.S.A. 21-3510(b) (Indecent solicitation of a child) was amended to raise the penalty for Indecent solicitation of a child from a severity level 7 person felony to a severity level 6 person felony.

K.S.A. 21-3511 (Aggravated indecent solicitation of a child) was amended to raise the penalty for Aggravated indecent solicitation of a child from a severity level 6 person felony to a severity level 5 person felony.

K.S.A. 2004 Supp. 21-3516(a)(2) (Sexual exploitation of a child) was amended to change the definition of Sexual exploitation of a child to allow the defendant to be charged with multiple counts of sexual exploitation of a child for each visual depiction of child pornography. Sexual exploitation of a child is a severity level 5 person felony.

K.S.A. 21-3830 (Dealing in false identification documents) was amended in subsection (b) to add “banking instrument including, but not limited to, credit or debit card, certified copies of birth, death, marriage and divorce certificates to the definition of identification document.

Subsection (c) was amended to change the penalty for Dealing in false identification documents from a severity level 10 nonperson felony to a severity level 8 nonperson felony.

Subsection (d) creates the crime of Vital records identity fraud related to birth, death, marriage and divorce certificates.

Subsection (e) provides that Vital records identity fraud is a severity level 8 nonperson felony.

Subsection (f) provides that sections (a) and (b) do not apply to a person less than 21 years of age who uses the identification document of another person to acquire an alcoholic beverage as defined in K.S.A. 8-1599; or to a person less than 18 years of age who use the identification documents of another person to: buy tobacco or cigarette products; communication mediums that contain or depict nudity; admittance to activities that are denied based on age; or an item that is prohibited by law for use or consumption by such person.

K.S.A. 65-2434(a) (Uniform Vital Statistics Act; Penalties) was amended to provide that Vital records identity fraud related to birth, death, marriage and divorce certificates shall be prosecuted pursuant to K.S.A. 21-3830, and amendments thereto.

K.S.A. 2004 Supp. 21-4018 (Identity theft) was amended in subsection (a) to change the definition of identity theft from knowingly and with intent to defraud for “economic” benefit to knowingly and with intent to defraud for “any” benefit.

Subsection (b) was amended to provide that “Identification documents” has the meaning provided in K.S.A. 21-3830 and amendments thereto.

Subsection (c) was amended to lower the penalty for Identity theft from a severity level 7 person felony to a severity level 8 nonperson felony.

Subsection (d) created the crime of Identity fraud.

Subsection (e) provides that Identity fraud is a severity level 8 nonperson felony.

K.S.A. 9-2203(c) (License required to conduct mortgage business) was amended to change the penalty from a misdemeanor to a severity level 7 nonperson felony for a first conviction. A second or subsequent conviction, regardless of its location on the sentencing grid block, is presumptive imprisonment for any person who willfully or knowingly violates any of the provisions of this act, any rule or regulation adopted or order issued under this act. **Note: A second or subsequent conviction pursuant to this statute is reflected as a new special rule on the Presentence Investigation form and Journal Entry of Judgment form.*

K.S.A. 2004 Supp. 21-3404(b) (Involuntary manslaughter) was amended to include reference to subsection (a) of K.S.A. 8-1568 (Fleeing or attempting to elude a police officer). Involuntary manslaughter remains a severity level 5 person felony.

K.S.A. 2004 Supp. 21-3436(b) (Inherently dangerous felony) was amended to add subsection (18) fleeing or attempting to elude a police officer, as defined in subsection (b) of K.S.A. 8-1568 and amendments thereto, to the list of inherently dangerous felonies.

K.S.A. 2004 Supp. 32-1032(a) (Big game and wild turkey violation; penalties) was amended to add stepped up penalties for a violation of the wildlife and parks laws of this state or the rules and regulations of the secretary relating to big game or wild turkey permits and game tags taking big game or wild turkey as further provided in this section:

Conviction	Category	Penalty = fine, county jail or both
First and Second Conviction	Misdemeanor	\$500 to \$1,000 fine; up to 6 months jail time
Third Conviction	Class B misdemeanor	\$1,000 fine; 30 days minimum in county jail
Fourth Conviction	Class A misdemeanor	\$1,000 fine; 60 days minimum in county jail
Fifth and Subsequent Conviction	Class A misdemeanor	\$1,000 fine; 90 days minimum in county jail

* Any conviction for a wildlife violation that occurs before July 1, 2005 is not considered for purposes of this section. The penalties included in the remaining subsections were not changed.

K.S.A. 2004 Supp. 22-4906 (Registration time) was amended to provide that the required registration period does not apply to any person while such person is incarcerated in any jail, correctional facility, or juvenile facility. The required registration period does not include any time when any person who is required to register under this act knowingly or willfully fails to comply with the registration requirement. Liability for registration does not terminate if the convicted offender again becomes liable to register as provided by this act during the required period. Juvenile offenders required to register under this act shall do so until 18 years of age, until the expiration of five years from the date of adjudication or, if confined, at the expiration of five years from the release from confinement, whichever date is later.

K.S.A. 2004 Supp. 22-4909 (Information subject to open records act; nondisclosure of certain information relating to victim) was amended to add subsections (b), (c), (d), and (e). Subsection (b) requires any information posted on an internet website sponsored or created by a sheriff's office or the Kansas Bureau of Investigation to identify, in a prominent manner, whether an offender is or is not a sex offender. Subsections (c), (d) and (e) require that any school district, accredited nonpublic school and licensed child care facility be notified annually of the availability of the Kansas Bureau of Investigation internet website and any internet website containing information on the Kansas offender registration sponsored or created by the sheriff of the county in which the school or facility is located, for the purpose of locating offenders who reside near such school or child care facility. Such notification shall also indicate that the sheriff of the county where the school or child care facility is located is available to assist with use of the registry and provide additional information on the registered offenders.

K.S.A. 65-67a09 created the Child Rape Protection Act. This Act requires any physician who performs an abortion on a minor who was less than 14 years of age at the time of the commission of the procedure to preserve fetal tissue and submit the tissue sample to the Kansas Bureau of Investigation or laboratory designated by the Director of the Kansas Bureau of Investigation.

Subsection (e) provides that failure of a physician to comply with the provisions of this Act is unprofessional conduct and a class A nonperson misdemeanor upon a first conviction and a severity level 10 nonperson felony upon a second or subsequent conviction.

K.S.A. 2004 Supp. 21-3520 (Unlawful sexual relations) was amended to broaden its application by adding Court Services Officers, Community Corrections Officers, employees of the Juvenile Justice Authority or Juvenile Community Supervision Agency, and employees of a contractor who provides supervision services for persons under Court Services or Community Corrections supervision to the list of potential offenders of this crime. The offender must have knowledge that the person with whom the offender is engaging in unlawful sexual relations is currently under the supervision of Court Services or Community Corrections. The definitions of "Community Corrections," "Court Services," "Law

Enforcement Officer,” and “Juvenile Community Supervision Agency” were also added. Conviction for unlawful sexual relations remains a severity level 10 person felony.

K.S.A 17-12a101 through 17-12a703 created the Kansas Uniform Securities Act. K.S.A. 2005 Supp. 17-12a508 (a) provides the Criminal penalties. (1) Except as provided in subsections (a) (2) through (a) (4), a conviction for an intentional violation of this act, or rule adopted or order issued under this act, except K.S.A 2005 Supp. 17-12a504, and amendments thereto, or the notice filing requirements of K.S.A. 2005 Supp. 17-12a302 or 17-12a405, and amendments thereto, is a severity level 7 nonperson felony. An individual convicted of violating a rule or order under this act may be fined, but not imprisoned, if the individual did not have knowledge of the rule or order.

Subsection (a)(2) a conviction for an intentional violation of K.S.A. 2005 Supp. 17-12a501 or 17-12a502, and amendments thereto is:

- (A) a severity level 4 nonperson felony if the violation resulted in a loss of \$100,000 or more;
- (B) a severity level 5 nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or
- (C) a severity level 7 nonperson felony if the violation resulted in a loss of less than \$25,000.

Subsection (a)(3) a conviction for an intentional violation of K.S.A. 2005 Supp. 17-12a301, 17-12a401(a), 17-12a401(c), 17-12a402(a), 17-12a402(d), 17-12a403(a), 17-12a403(c), 17-12a403(d), 17-12a404(a), or 17-12a404(e), and amendments thereto is:

- (A) a severity level 5 nonperson felony if the violation resulted in a loss of \$100,000 or more;
- (B) a severity level 6 nonperson felony if the violation resulted in a loss of at least \$25,000 but less than \$100,000; or
- (C) a severity level 7 nonperson felony if the violation resulted in a loss of less than \$25,000.

Subsection (a)(4) a conviction for an intentional violation of K.S.A. 2005 Supp. 17-12a505 or 17-12a506, and amendments thereto is a severity level 8 nonperson felony.

Subsection (a)(5) any violation of K.S.A. 2005 Supp. 17-12a301, 17-12a401(a), 17-12a401(c), 17-12a402(a), 17-12a402(d), 17-12a403(a), 17-12a403(c), 17-12a403(d), 17-12a404(a), 17-12a404(e), 17-12a501 or 17-12a502, and amendment thereto, resulting in a loss of \$25,000 or more shall have a presumptive sentence of imprisonment regardless of its location on the sentencing grid block.

January 1, 2006

K.S.A. 44-719 (Employment Security Law; Penalties for violation of act; repayment of benefits ineligible to receive, interest thereon) was amended to add subsection (f) which created the crime of unlawfully reducing or attempting to reduce liability for unemployment contributions by an employing unit, a severity level 9 nonperson felony.

2006 Kansas Legislative Session

A number of changes were made to Kansas criminal laws during the 2006 Kansas Legislative Session. For a full description of the changes made, please see the **“2006 LEGISLATIVE CHANGES TO THE SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW”** section of this Manual.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

Sentencing Considerations

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case. See K.S.A. 2005 Supp. 21-4603d.

Sentencing Guidelines

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids, containing the sentencing range for drug crimes and nondrug crimes, were developed for use as a tool in sentencing. The sentencing guidelines grids provide practitioners in the criminal justice system with an overview of presumptive felony sentences. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid block where the severity level of the crime and the offender's total criminal history score intersect is the presumed sentence, stated in months. See K.S.A. 2005 Supp. 21-4704.

Off-Grid Crimes

The crimes of capital murder (K.S.A. 21-3439), murder in the first degree (K.S.A. 21-3401) and treason (K.S.A. 21-3801) are designated as off-grid person crimes and for such crimes the term of imprisonment shall be imprisonment for life. K.S.A. 2005 Supp. 21-4706. A person convicted of premeditated first-degree murder will be eligible for parole after serving 25 years in confinement unless the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-4636 exist and, that such aggravating circumstances are not outweighed by any mitigating circumstances. In that case, the person shall serve 40 or 50 years before becoming eligible for parole pursuant to K.S.A. 21-4638. See K.S.A. 2005 Supp. 22-3717(b)(1) and 21-4635. Felony murder and treason carry a term of life imprisonment with eligibility for parole after serving 20 years. K.S.A. 2005 Supp. 22-3717(b)(2) (for crimes committed on or after July 1, 1999).

K.S.A. 2005 Supp. 21-4635 provides that if a person is convicted of capital murder and a sentence of death is not imposed pursuant to K.S.A. 21-4624, such person shall be sentenced to life imprisonment without the possibility of parole. (Amended in 2004 Legislative Session and effective for offender's convicted of capital murder for crimes committed on or after July 1, 2004. See L. 2004, ch. 102, § 4.) The death penalty and the sentence of life imprisonment without parole do not apply to juveniles or persons determined to be mentally retarded.

In 1999, the crime of Intentional Second Degree Murder, K.S.A. 1998 Supp. 21-3402(a) was placed back on the grid as a nondrug grid severity level 1 offense for crimes committed on or after July 1, 1999. See L. 1999, ch. 164 § 5.

In 2006, Senate Substitute for House Bill 2576 was passed and created new off-grid crimes for certain sex offenses that involve a victim less than 14 years of age and an offender 18 years of age or older. See the 2006 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW section, pages 13-17, for more details.

Drug Grid and Nondrug Grid

There are two grids used for sentencing on felony convictions. The drug grid is used for sentencing of drug crimes described in K.S.A. Chapter 65, Article 41. The nondrug grid is used for sentencing of all other felony crimes. Both grids are similar in appearance. The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains four severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are unshaded grid blocks, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that have vertical lines passing through them, which are referred to as “border boxes.” A border box has a presumptive prison sentence but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains five border boxes, in levels 3-E, 3-F, 3-G, 3-H and 3-I. See K.S.A. 2005 Supp. 21-4704 and 21-4705.

Grid Blocks

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2005 Supp. 21-4704 and 21-4705.

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid block. The court may also depart downward to lower the duration of a presumptive sentence to any extent. See K.S.A. 2005 Supp. 21-4716, 21-4717 and 21-4718. The court may also impose a dispositional departure when aggravating or mitigating circumstances exist that are substantial and compelling. See K.S.A. 21-4719(c)(2).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and this change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter, or in a bifurcated jury proceeding following the trial. See K.S.A. 2005 Supp. 21-4718.

CHAPTER II: PROCEDURE PRIOR TO SENTENCING

Determination of the Date of Offense; Application to the Sentencing Guidelines

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 21-4723.

The date of offense controls selection of the appropriate Journal Entry form. Each year the Journal Entry forms are updated to reflect the laws and special sentencing rules in effect for that year. Therefore, when completing a journal entry form make sure that the year of the form corresponds with the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2001 Journal entry form. For an offense committed October 7, 1996, the corresponding 1996 Journal entry form should be completed.

Accusatory Instruments

All accusatory instruments filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is subclassified into different versions of the same offense that have been assigned different severity levels, the accusatory instrument should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the accusatory instrument. See K.S.A. 2005 Supp. 22-3201.

Fingerprinting; Sentencing Guidelines Implications

Municipal Court Duties The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408. See K.S.A. 12-4517.

Law Enforcement Duties Every sheriff, police department or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions of a person who is arrested if the person is wanted for the commission of a felony. On or after July 1, 1993, fingerprints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 21-3408. See K.S.A. 21-2501(a).

County/District Court Duties The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed and fingerprinted. See K.S.A. 21-2501(b).

Juvenile Court Duties The court must ensure upon first appearance, or in any case, before final disposition that the offender has been processed and fingerprinted. This rule is applicable to those offenders charged with an offense which, if committed by a person 18 or more years of age, would be a felony, a class A or B misdemeanor, or assault as defined by K.S.A. 21-3408. See K.S.A. 2005 Supp. 38-1611.

Official Records

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the attorney general, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. All law enforcement agencies must file a report of such offenses, on a form approved by the attorney general, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported or known to have been committed. Effective April 21, 2005, all law enforcement agencies must report within 30 days and on forms approved by the attorney general, any methamphetamine laboratory seizures or dump sites and any theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. See K.S.A. 2005 Supp. 21-2501a.

Plea Agreement Rules

The parties may move to dismiss any charge or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. See K.S.A. 21-4713.

A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 21-4708(b)(2).

The sentencing court is free to accept or reject any plea agreement entered into by the parties. At the time of acceptance of a plea of guilty or nolo contendere, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2005 Supp. 22-3210.

Once the guilty or nolo contendere plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 4704(b)(4).

Diversions

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony. See K.S.A. 2005 Supp. 22-2908(b).

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife and Parks laws (Article 10 of Chapter 32) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 2005 Supp. 22-2908(c).

Deferring Sentence Pending Mental Examination

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. See K.S.A. 22-3429.

Drug Abuse Assessment

As part of the presentence investigation, offenders who meet the requirements of K.S.A. 21-4729(a) (2003 Senate Bill 123) shall be subject to a drug abuse assessment which shall include a clinical interview with a mental health professional (as defined in subsection (g) of K.S.A. 21-4729) and a recommendation concerning drug abuse treatment for the offender, and a criminal risk-need assessment, unless otherwise specifically ordered by the court. The criminal risk need assessment shall assign a high or low risk status to the offender. K.S.A. 2006 Supp. 21-4729, See Chapter 211, Section 7, of the 2006 Session Laws (2006 H Sub for SB 431).

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. The presentence drug abuse treatment program placement assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services. See K.S.A. 2005 Supp. 75-52,144(b).

The drug abuse assessment is only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. See K.S.A. 2005 Supp. 21-4714(c).

CHAPTER III: CRIME SEVERITY LEVELS

General Rules for Determining Severity Levels

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. See K.S.A. 21-4707(a).

The crime severity scale contained in the sentencing guidelines grid for drug crimes consist of four levels of crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 4 is used to categorize the least severe crimes. See K.S.A. 21-4708(a).

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- (1) The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. See K.S.A. 21-4707(c)(1).
- (2) Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. See K.S.A. 21-4707(c)(2).
- (2) All unclassified felonies shall be scored as level 10 nonperson crimes. See K.S.A. 21-4707(c)(3).

All felony crimes with the exception of off-grid crimes (see p. 38), felony driving under the influence (K.S.A. 2005 Supp. 8-1567), felony domestic battery (K.S.A. 2005 Supp. 21-3412a), and animal cruelty (K.S.A. 2006 Supp. 21-4310 and 21-4318) should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All of the KSGA felonies are listed in Appendix E of this Manual in three versions: numerically by statute number; alphabetically by description; and by severity level and then by statute number.

Anticipatory Crimes

The anticipatory crimes, attempt, conspiracy and solicitation, are treated differently for off-grid felonies, offenses on the nondrug grid and drug grid, and misdemeanor offenses.

Attempt (K.S.A. 21-3301)

- An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1.
 - *Except for certain sex offenses wherein the victim is less than 14 years of age and the offender is 18 years of age or older.* K.S.A. 2006 Supp. 21-4642 and 21-4643 (See Chapter 212, Sections 1 and 2, of the 2006 Session Laws).

- An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10.
- An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.
 - The provision for the reduction of a sentence on the drug grid by six months for an attempted crime does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 65-4159. See K.S.A. 2005 Supp. 65-4159
- An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

Conspiracy (K.S.A. 21-3302)

- Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2.
 - *Except for certain sex offenses wherein the victim is less than 14 years of age and the offender is 18 years of age or older.* K.S.A. 2006 Supp. 21-4642 and 21-4643 (See Chapter 212, Sections 1 and 2, of the 2006 Session Laws).
- Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10.
- Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.
- Conspiracy to commit a misdemeanor is a class C misdemeanor.

Solicitation (K.S.A. 21-3303)

- Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3.
 - *Except for certain sex offenses wherein the victim is less than 14 years of age and the offender is 18 years of age or older.* K.S.A. 2006 Supp. 21-4642 and 21-4643 (See Chapter 212, Sections 1 and 2, of the 2006 Session Laws).
- Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three (3) severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10.
- Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.

CHAPTER IV: CRIMINAL HISTORY

Criminal History Rules

The horizontal axis, or top of the grid represents the criminal history categories. There are nine categories used to designate prior criminal history. Category A is used to categorize offenders having three (3) or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighted more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 21-4709.

The criminal history scale is represented in an abbreviated form on the horizontal axis of the sentencing guidelines grid for nondrug crimes and the sentencing guidelines grid for drug crimes. The relative severity of each Criminal History Category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

Criminal History Category	Descriptive Criminal History
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.

H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

Criminal History Categories are based upon the following types of prior convictions and/or adjudications:

- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson select misdemeanors and comparable municipal ordinance and county resolution violations.

The “person” designation refers to crimes that inflict, or could inflict, physical or emotional harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery. The “nonperson” designation refers generally to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver's license, perjury, etc. The “select” designation refers to convictions for weapons violations.

All convictions and adjudications, except as otherwise provided, should be included in the offender's criminal history. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction. An offender's **criminal history classification** is determined using the following rules pursuant to K.S.A. 21-4710:

- 1) Only verified prior convictions will be considered and scored. K.S.A. 21-4710(d)(1).
 - **A prior conviction is** any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 21-4710(a).
 - The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction. See K.S.A. 21-4710(d)(9) and 21-4723.
 - Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 21-4710(c).

- 2) All prior adult felony convictions, including expungements, will be considered and scored. K.S.A. 21-4710(d)(2).
- 3) There will be no decay factor applicable to adult convictions. K.S.A. 21-4710(d)(3).
- 4) All person misdemeanor convictions, class A nonperson misdemeanor convictions, class B select nonperson misdemeanors, and comparable municipal ordinance and county resolution violations shall be considered and scored. K.S.A. 21-4710(d)(7).
 - Convictions for “comparable municipal ordinance and county resolution violations” may only be scored for criminal history purposes for crimes committed on or after July 1, 1994, when K.S.A. 1993 Supp. 21-4710(d)(7) was amended to specifically allow for those convictions to be counted for criminal history purposes. See *State v. Dunn*, 21 Kan. App. 2d 359, 900 P.2d 245 (1995).
- 5) Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 21-4710(d)(8).
- 6) Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 21-4710(d)(9).
- 7) Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 21-4710(d)(10).
- 8) If prior convictions of any crime operate to enhance the severity level or penalties for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, those prior convictions may not be counted in the offender’s criminal history. Unless otherwise provided, all other prior convictions will be considered and scored. See K.S.A. 21-4710(d)(11).

Juvenile Adjudications

Except as otherwise provided, a juvenile adjudication which would have been a nonperson class D or class E felony if committed before July 1, 1993, or a nondrug level 6, 7, 8, 9 or 10, or drug level 4, nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, will decay if the current crime of conviction is committed after the offender reaches the age of 25. K.S.A. 21-4710(d)(4).

For convictions of crimes committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B or C felony, if committed by an adult, will not decay. For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4 or 5 felony, or a drug severity level 1, 2 or 3 felony, if committed by an adult, will not decay. K.S.A. 21-4710(d)(5). All juvenile adjudications that would constitute a person felony will not decay. K.S.A. 21-4710(d)(6).

Diversions

Diversions are not “convictions” and are therefore not included in criminal history, with the exception of the felony DUI and the Involuntary Manslaughter provisions.

- The felony DUI exception provides that, for the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under the DUI provisions, a “conviction” includes entering into a diversion agreement in lieu of further criminal proceedings on a DUI violation. See. K.S.A. 2005 Supp. 8-1567(m)(1), (2).
- On or after July 1, 1996, if the current crime of conviction is for a violation of K.S.A. 21-3442, Involuntary Manslaughter while driving under the influence of drugs or alcohol, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a DUI violation shall count as one person felony for criminal history purposes. See. K.S.A. 2005 Supp. 21-4711(c)(2).

Information Not Relevant to Criminal History

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do **not** include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.
- **Adults:** Do **not** include traffic infractions, diversions (except as indicated above), contacts with law enforcement, or arrests not resulting in conviction.

Special Applications in Determining Criminal History **K.S.A. 2005 Supp. 21-4711**

The following special rules are applicable to the determination of the offender's criminal history category.

3:1 Person Misdemeanors

Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in the offender's criminal history, or any combination thereof, are to be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2005 Supp. 21-4711(a). Convictions or adjudications for misdemeanor person crimes may place an offender in a higher criminal history category classification. For example, an offender who has five misdemeanor batteries will fall into criminal history category D, which reflects one prior person felony conviction, rather than criminal history category H, which reflects only multiple misdemeanor convictions.

In addition, every three prior adult convictions or adjudications of misdemeanor assault as defined in K.S.A. 21-3408 that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime of conviction, are also to be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. See K.S.A. 2005 Supp. 21-4711(a).

Select Class B Nonperson Misdemeanors

A prior conviction for a violation of: subsection (a)(1) of K.S.A. 21-4204, criminal possession of firearms by a person who is both addicted to and an unlawful user of a controlled substance; subsection (a)(5) of K.S.A. 21-4204, possession of a firearm on school grounds; or K.S.A. 21-4218, possession of a firearm on the grounds of or in the state capitol building, shall be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. See K.S.A. 2005 Supp. 21-4711(b).

Involuntary Manslaughter and DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 8-1567, or a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits acts described in K.S.A. 8-1567, shall count as one person felony for criminal history purposes. See K.S.A. 2005 Supp. 21-3442 and 21-4711(c)(2).

Burglary

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling, as described in subsection (a) of K.S.A. 21-3715. K.S.A. 2005 Supp. 21-4711(d)(1).
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling, as described in subsection (b) of K.S.A. 21-3715. K.S.A. 2005 Supp. 21-4711(d)(2).
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in subsection (c) of K.S.A. 21-3715. K.S.A. 2005 Supp. 21-4711(d)(2).

The facts required to classify prior adult convictions or juvenile adjudications for burglary, must be established by the State by a preponderance of the evidence. See K.S.A. 2005 Supp. 21-4711(d).

Out-of-State Convictions

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification. Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2005 Supp. 21-4711(e). For example, if a crime is a felony in another state, it will be counted as a felony for criminal history purposes regardless of the classification of the crime under Kansas law.

However, the state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, comparable Kansas offenses shall be referred to. K.S.A. 2005 Supp. 21-4711(e). See also *State v. LaGrange*, 21 Kan. App. 2d 477, 901 P.2d 44 (1995), *rev. denied* 258 Kan. 861.

(1995). If the state of Kansas does not have a comparable offense, the out-of-state conviction will be classified as a nonperson crime. Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 2005 Supp. 21-4711(e).

The facts required to classify out-of-state adult convictions and juvenile adjudications such that they are considered in the determination of the offender's criminal history score must be established by the State by a preponderance of the evidence. K.S.A. 2005 Supp. 21-4711(e).

Juvenile Records

Subject to the decay rules in K.S.A. 21-4710(d) (4), (5), and (6), prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2005 Supp. 21-4711(f).

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 2005 Supp. 22-3212(i).

Anticipatory Crimes

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 2005 Supp. 21-4711(g).

Drug Crimes

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 2005 Supp. 21-4711(h).

Proof of Criminal History

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history and the sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. See. K.S.A. 2005 Supp. 21-4715.

CHAPTER V: PRESENTENCE INVESTIGATION REPORTS

Requirements

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2005 Supp. 21-4714(a). The KSGA establishes a uniform format for the PSI in all felony cases. This format must be used to provide consistency statewide. The PSI includes a face sheet, a Criminal History Worksheet, and limited topic sections covering the current offense: official version, defendant's version, victim(s) statement(s), drug, alcohol, and psychological evaluations of the defendant, restitution amounts, and the field services officer's recommendations regarding conditions of probation where appropriate. See K.S.A. 2005 Supp. 21-4714. A copy of the PSI, the Criminal History Worksheet and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission concerning each felony case within thirty days after sentencing. K.S.A. 2005 Supp. 22-3439(a).

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, **shall be limited to** the following information:

1. A summary of the factual circumstances of the crime or crimes of conviction.
2. If the defendant desires to provide one, a summary of the defendant's version of the crime.
3. When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
4. An appropriate classification of each crime of conviction on the crime severity scale.
5. A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and copies of any available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.
 - a. The following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.
 - i. **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.
 - ii. **Adults:** Do not include traffic infractions, diversions (except as indicated on p. 48), contacts with law enforcement, or arrests not resulting in conviction.
6. A proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.

7. If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity scale.
8. If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.
9. For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 65-4160 or 65-4162, and meet the requirements of K.S.A. 2005 Supp. 21-4729 (2003 Senate Bill 123), the drug and alcohol assessment as provided in K.S.A. 2005 Supp. 21-4729.

The presentence investigation report will become part of the court record and accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports and drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 75-5220. K.S.A. 2005 Supp. 21-4714(c).

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2005 Supp. 21-4714(d).

The presentence investigation report will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2005 Supp. 21-4714(e).

The sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. See K.S.A. 2004 Supp. 21-4714(f). See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. See K.S.A. 2005 Supp. 21-4714(g).

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form and Instructions for completing the Presentence Investigation Report form is contained in Appendix D of this Manual.

CHAPTER VI: SENTENCING

Sentencing Range

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the “standard” number of months, the upper number in the grid block is the “aggravated” number of months, and the lower number in the grid block is the “mitigated” number of months. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 2005 Supp. 21-4704.

Sentencing Options

The sentencing court is free to impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure. While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may depart from the presumptive sentence based upon substantial and compelling reasons. See K.S.A. 2005 Supp. 21-4704 and 21-4716. The sentencing court may increase the sentence up to double the duration within the grid block, lower the duration to any extent, or impose a dispositional departure when aggravating or mitigating circumstances exist which are substantial and compelling. See K.S.A. 2005 Supp. 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. However, in the 2002 Legislative Session, K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were both amended to correct the upward durational departure problem arising from *Gould*, effective June 6, 2002. A bifurcated jury procedure is now provided to allow the jury to determine any aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard.

Fines

Felony and misdemeanor fines are as follows (K.S.A. 2005 Supp. 21-4503a):

Off-grid and drug severity level 1	≤ \$500,000
Nondrug severity level 1 through 5 and drug severity level 2 and 3	≤ \$300,000
Nondrug severity level 6 through 10 and drug severity level 4	≤ \$100,000
Class A misdemeanor	≤ \$2,500
Class B misdemeanor	≤ \$1,000
Class C misdemeanor	≤ \$500
Traffic infraction	≤ \$500
Cigarette or Tobacco infraction	\$25

The maximum penalty for a violation of the Kansas Securities Act is \$25,000 for each violation. If the violation is committed against an elderly or disabled person, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed \$15,000 for each violation. The total penalty against a person shall not exceed \$1,000,000. See K.S.A. 2005 Supp. 17-12a412, 17-12a603 and 17-12a604.

Presumptive Nonimprisonment

In a presumptive nonimprisonment case, the sentencing court must pronounce the duration of the nonprison sanction and must pronounce the underlying prison sentence. See K.S.A. 2005 Supp. 21-4704(e)(3), 21-4705(c)(3) and 21-4706(b).

Period of Probation or Assignment to Community Corrections

For all crimes committed on or after July 1, 1993, duration of probation in felony cases sentenced for the following severity levels is as follows (K.S.A. 2004 Supp. 21-4611(c)):

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤18	≤12	≤12
Drug	36	36	≤18	* ≤12	N/A	N/A	N/A	N/A	N/A	N/A

* Offenders sentenced to participation in a certified drug abuse treatment program pursuant to K.S.A. 21-4729 may remain on probation for up to 18 months.

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7 and on the drug grid for severity levels 1 and 2. The sentencing court may set the duration of probation at their discretion up to a maximum of five (5) years or the maximum period of the prison sentence that could be imposed, whichever is longer. If the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. K.S.A. 2005 Supp. 21-4611(a), (c). If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid. See K.S.A. 2005 Supp. 21-4611(c)(7).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid and severity levels 3 and 4 on the drug grid. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2004 Supp. 21-4611. K.S.A. 2005 Supp. 21-4611(c).

Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders ordered to community placement. The maximum amount of time an offender can be incarcerated in a county jail as a condition of probation in a felony case is 60 days (with an additional maximum of 60 days in jail as a condition of a probation revocation), except for convictions for felony driving under the influence, felony domestic battery and animal cruelty. See K.S.A. 2005 Supp. 21-4603d(a)(3) and 21-3412a(b) and K.S.A. 2006 Supp 21-4310(d) and 21-4318(c) (Chapter 126, Sections 1 and 3 of the 2006 Session Laws). For crimes committed prior to July 1, 1999, an offender may also be sentenced to jail for more than thirty days for a conviction for deprivation of property which is a motor vehicle. See K.S.A. 2005 Supp. 21-3705(b).

Target Population for Community Corrections (2000 Senate Bill 323)

House Substitute for Senate Bill 323, passed into law during the 2000 Kansas Legislative Session amended, K.S.A. 1999 Supp. 75-5291(a)(2) to define the target population of offenders for placement in Community Corrections programs. Currently this target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

1. Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
2. Offenders whose sentence falls within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
3. Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;
4. Offenders convicted of a sex offense as defined in K.S.A. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is imposed;
5. Offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established as provided in K.S.A. 22-3716 prior to revocation to a state correctional facility;
6. Offenders who are determined to be “high risk or needs, or both” by the use of a statewide, mandatory, standardized risk assessment tool or instrument validated for community corrections placement;
7. Offenders who are placed in community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
8. Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2005 Supp. 21-4729 (2003 Senate Bill 123 treatment). See K.S.A. 2005 Supp. 75-5291(a)(2).

Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2005 Supp. 75-5291(a)(4). A public safety provision also allows direct placement to prison of offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2005 Supp. 75-5291(a)(5).

Target Population for Community Corrections (2003 Senate Bill 123)

Senate Bill 123, passed into law during the 2003 Kansas Legislative Session, amended K.S.A. 2002 Supp. 21-4603d to create a nonprison sanction of certified drug abuse treatment under community corrections supervision for a defined target population of offenders. Currently this target population is defined in K.S.A. 2005 Supp. 21-4729 and consists of **adult** offenders convicted of K.S.A. 65-4160 or 65-4162, who meet one of the following criteria:

1. Offenders whose offense is in the 4-E, 4-F, 4-G, 4-H or 4-I grids blocks of the drug grid and who have no prior conviction(s) of: K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute); 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute); 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute); 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute); or 65-4164 (the unlawful acts relating to certain narcotic drugs statute), or any similar offense from another jurisdiction; or
2. Offenders whose offense is in the 4-A, 4-B, 4-C, or 4-D grids blocks of the drug grid and who have no prior conviction(s) of: K.S.A. 65-4142 (the unlawful acts involving proceeds derived from violations of the uniform substances control act statute); 65-4159 (the unlawful manufacturing or attempting such of any controlled substance statute); 65-4161 (unlawful acts relating to sale or distribution of opiates, opium, narcotic drugs or designated stimulants statute); 65-4163 (the unlawful acts relating to sale or distribution of depressants, stimulants or hallucinogenic drugs or other substances statute); or 65-4164 (the unlawful acts relating to certain narcotic drugs statute), or any similar offense from another jurisdiction, **if** the offender's prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses and the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. See K.S.A. 2005 Supp. 21-4729.

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks but do not qualify for the certified drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. This must also be done for an offender prior to the revocation of a nonprison sanction for an offender whose offense is classified in the 4-E or 4-F drug grid blocks but does not qualify for the certified drug treatment program. K.S.A. 2005 Supp. 21-4603d(g).

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 4-E or 4-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 21-4729. K.S.A. 2005 Supp. 21-4603d(l).

On or after July 1, 2006, offenders, who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law.

Presumptive Imprisonment

In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. See K.S.A. 2005 Supp. 21-4704(e)(2) and 21-4705(c)(2).

Good Time

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995, and 15% for crimes committed on or after April 20, 1995. See K.S.A. 2005 Supp. 21-4706(a) and 21-4722(a)(2). Any reduction in the prison sentence due to good time must be added to the postrelease supervision period to be served after the prison sentence is completed. See K.S.A. 2005 Supp. 22-3717(d) and 21-4722(b).

Border Boxes

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

1. An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
2. the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
3. the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. See K.S.A. 2005 Supp. 21-4704(f) and 21-4705(d).

Special Applications in Sentencing

Person Felonies Committed With a Firearm

When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2005 Supp. 21-4704(h).

Aggravated Assault/Aggravated Battery Against a Law Enforcement Officer

The sentence for a conviction under K.S.A. 21-3411 (aggravated assault of a law enforcement officer) or K.S.A. 2005 Supp. 21-3415 (aggravated battery against a law enforcement officer) which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2005 Supp. 21-4704(g).

Crime Committed for the Benefit of a Criminal Street Gang

If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2005 Supp. 21-4704(k).

Persistent Sex Offender

The sentence for any persistent sex offender (as defined in K.S.A. 2005 Supp. 21-4704(j)) whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of conviction is a severity level 1 or 2 felony, unless such current conviction is for the crime of rape (K.S.A. 21-3502) and the offender has at least one prior conviction for rape in this state or a comparable felony from another state. K.S.A. 2005 Supp. 21-4704(j).

NOTE: A prior conviction used to classify a defendant as a persistent sex offender may not again be used to determine that defendant's criminal history category. *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123 (2000), affirmed *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001). For example:

- An offender's current crime of conviction is sexual exploitation of a child (K.S.A. 21-3516). The offender has one prior conviction of indecent solicitation of a child (K.S.A. 21-3510). The offender's prior conviction will be used to determine the offender's status as a "persistent sex offender" and will not be used in calculating the offender's criminal history category. Therefore,

the offender will have a criminal history score of 5-I (sentence doubled) if the offender has no other criminal convictions.

- An offender's current conviction is indecent liberties with a child (K.S.A. 21-3503). The offender has two prior convictions of indecent solicitation of a child (K.S.A. 21-3510). One prior conviction of indecent solicitation of a child will be used to determine the offender's status as a "persistent sex offender" and the other conviction will be used in calculating the offender's criminal history score. Therefore, the offender will have a criminal history score of 5-D (sentence doubled) if the offender has no other person/nonperson felony convictions.

Felony DUI

Felony driving under the influence as defined in K.S.A. 2005 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. See K.S.A. 2005 Supp. 21-4704(i).

K.S.A. 2000 Supp. 8-1567 was amended in the 2001 Legislative Session and as a result, it is possible for an offender convicted of a fourth or subsequent DUI to serve time in the KDOC in the event he or she violates conditions of postrelease supervision. See K.S.A. 2005 Supp. 8-1567(g).

Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 2005 Supp. 21-3412a, is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. See K.S.A. 2005 Supp. 21-4704(i).

K.S.A. 2000 Supp. 21-3412 was amended in the 2001 Legislative Session and felony domestic battery became a separate statute, namely K.S.A. 21-3412a.

New Felony Committed While the Offender is Incarcerated and Serving a Sentence for a Felony, or While the Offender is on Probation, Assignment to a Community Correctional Services Program, Parole, Conditional Release, or Postrelease Supervision for a Felony

Under any of these conditions, the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. See K.S.A. 2005 Supp. 21-4603d(f) and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001).

New Felony Committed While the Offender is on Release for a Felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated (Felony Bond)

Under this condition the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. See K.S.A. 2005 Supp. 21-4603d(f).

Extended Jurisdiction Juvenile Imposed

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 38-1633 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.*

Second or Subsequent Conviction for Manufacture of a Controlled Substance

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2004 Supp. 65-4159, is a drug grid severity level 1 offense and the sentencing court is required to double the presumptive sentence length. *However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist.* Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. See K.S.A. 2005 Supp. 21-4705(e).

Burglary of a Residence Committed When the Offender has a Prior Conviction for Burglary of a Residence or Non-Residence, or a Prior Conviction for Aggravated Burglary

The sentence for the violation of subsection (a) of K.S.A. 21-3715, and amendments thereto, (burglary of a residence) when the offender has a prior conviction for the burglary of a residence or non-residence, or an aggravated burglary (K.S.A. 21-3716), shall be presumed imprisonment. See K.S.A. 2005 Supp. 21-4704(l).

Kansas Securities Act

Any violation of the Kansas Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. See K.S.A. 2005 Supp. 17-12a508(a)(4).

Second or Subsequent Conviction for Forgery

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. Upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or \$500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$1,000. Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$2,500. See K.S.A. 2005 Supp. 21-3710(b).

Mortgage Business Act

Any person who willfully or knowingly violates any of the provisions of this act, any rule and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2005 Supp. 9-2203(c).

Loan Brokers Act

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993, resulting in a loss of \$25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 50-1013(a).

Animal Cruelty

Felony animal cruelty, as defined in K.S.A. 2006 Supp. 21-4310(a)(1) and (d)(2)(second or subsequent conviction of a violation of (a)(2), (a)(3), (a)(4), or (a)(5)), is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2006 Supp. 21-4310(d)(1) or (d)(2). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2006 Supp. 21-4704(i), K.S.A. 2006 Supp. 21-4310, Chapter 126, Sections 1 and 4 of the 2006 Session Laws.

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 2006 Supp. 21-4318(a), is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2006 Supp. 21-4310(c). Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2006 Supp. 21-4704(i), K.S.A. 2006 Supp. 21-4318, Chapter 126, Sections 3 and 4 of the 2006 Session Laws.

Aggravated Habitual Sex Offender

Senate Sub for House Bill 2576 (Jessica's Law) as passed in the 2006 Legislative session provides that the sentence for an aggravated habitual sex offender shall be imprisonment for life without the possibility of parole in the custody of the secretary of corrections. An offender who is sentenced pursuant to this section shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence.

An "aggravated habitual sex offender" is defined as a person who, on and after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction, has been convicted on at least two prior conviction events of any sexually violent crime. A "prior conviction event" is defined as one or more felony convictions of a sexually violent crime, occurring on the same day and within a single count. These convictions may result from multiple counts within an information or from more than one information. If a person crosses a county line and commits a felony as part of the same criminal act or acts, such felony, if such person is convicted, shall be considered part of the prior conviction event.

Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of corrections and the court shall state in the sentencing order of judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole. The 2006 Journal Entry of Judgment form has been updated to reflect this requirement.

Sentencing in General

Authorized Dispositions (K.S.A. 2005 Supp. 21-4603d)

Whenever any person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. The court may:

- Commit the defendant to prison if the defendant's current crime is a felony and the sentence is presumptive imprisonment, or the sentence imposed is a dispositional departure;
 - If the sentence is imprisonment, the sentencing court shall fix the term of confinement within the limits provided by law. If the law does not fix a term of confinement for the crime for which the defendant was convicted, the court shall fix the term of such confinement.
 - If the court commits the defendant to prison or to jail, the court may specify in its order the amount of restitution to be paid and to whom it shall be paid if it is later ordered as a condition of parole, conditional release or postrelease supervision.
- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor;
- Impose fines applicable to the offense that may be paid in installments if authorized by the court;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2005 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;
- Assign the defendant to house arrest pursuant to K.S.A. 21-4603b;
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (3) of K.S.A. 2005 Supp. 21-4502;
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 2005 Supp. 22-4529 unless waived by the court;

- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 2005 Supp. 20-369;
- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant's crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by subsection (4) of K.S.A. 2005 Supp. 21-4502;
- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent's defense services to provide counsel and other defense services to the defendant.
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute.

See K.S.A. 2005 Supp. 21-4603d.

Procedure Prior to the Imposition of a Dispositional Departure, or Before Imposing a Prison Sentence When Revoking a Nonprison Sanction

The sentencing court shall consider placement of an offender in the Labette Correctional Conservation Camp, conservation camps established by the Secretary of Corrections pursuant to K.S.A. 2005 Supp. 75-52,127, or a community intermediate sanction center in the following instances:

- Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guidelines grid;
- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I of the sentencing guidelines grid for drug crimes;
- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2005 Supp. 21-4729;
- Prior to revocation of a nonprison sanction of a defendant whose offense is classified grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2005 Supp. 21-4729; or
- Prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-

G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I, of the sentencing guidelines grid for drug crimes.

A defendant **shall not** be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all the conservation camp's or a community intermediate sanction center's placement criteria, *unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center.* K.S.A. 2005 Supp. 21-4603d(g).

Revocation of Nonprison Sanction of Certified Drug Abuse Treatment **(K.S.A. 2006 Supp. 21-4729)**

If the offender fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, **as established by judicial finding** or is convicted of a new felony, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 21-4705. K.S.A. 2005 Supp. 21-4603d(n) and K.S.A. 2006 Supp. 21-4729(f) (Chapter 211, Section 7, of the 2006 Session Laws). Upon completion of the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision and the amount of time spent participating in such program shall not be credited as time against the underlying prison sentence. (This includes time spent in residential treatment). See K.S.A. 2005 Supp. 21-4603d (n) and 21-4705.

Multiple Convictions; Sentences on Same Date

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 20-4608(c), (d) and (e). *The sentencing court must state on the record whether the sentence is to be served concurrently or consecutively.* See K.S.A. 21-4608 and K.S.A. 2005 Supp. 21-4720(b).

Limitations on Concurrent and Consecutive Sentences for Multiple Convictions

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 2005 Supp. 21-4720(a). Pursuant to K.S.A. 21-4608, consecutive sentencing is generally required when imposing:

- A sentence for a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony;
- A sentence for a felony committed while the offender was on felony bond;
- A sentence for a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 21-4608(c), (d) and (e).

- If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.
- If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Kansas Parole Board or reaches the maximum sentence date on the old sentence, whichever is earlier.
- The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 21-4608(e)(2).
 - Note: Effective July 1, 2000, incarceration at the time of commission of a new crime was added to the list of aggravating factors which may be considered in determining whether substantial and compelling reasons for an upward departure exist. K.S.A. 2005 Supp. 21-4716(c)(2)(G), see also K.S.A. 2005 Supp. 21-4717(a)(4).

When consecutive sentences are imposed for multiple convictions in one case, stemming from multiple counts brought in one charging instrument, the total prison sentence imposed cannot exceed twice the base sentence. It is not necessary to reduce the duration of any of the nonbase sentences in order to satisfy this rule because the limit applies only to the total controlling sentence. K.S.A. 2005 Supp. 21-4720(b)(4). This means that the sentencing court is not required to shorten the length of any of the individual nonbase sentences given to an offender, as long as the court orders that the total sentence given to the offender (see the “**Grand Total Months of Confinement Imposed – (SUM OF DOC, County Jail [nongrid offenses], or Underlying Prison Term** at Section VI of the KSGA Journal Entry of Judgment form) is adjusted so that it does not exceed twice the base sentence.

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 2005 Supp. 21-4720(b)(2).

When an offender is sentenced for multiple convictions of crimes carrying both presumptive prison and nonprison sentences, if the sentence for the primary crime is prison, the entire imprisonment term of consecutive sentences, will be served in prison. K.S.A. 2005 Supp. 21-4720(b)(6).

The postrelease supervision period will be the longest supervision period imposed for any of the multiple convictions, including the lifetime supervision period carried by a life sentence imposed for an off-grid crime. Even in the case of consecutive prison sentences, postrelease supervision periods will not be aggregated. In addition, in cases of multiple nonprison sentences, even if the underlying prison sentences are ordered to run consecutively, the nonprison terms shall not be aggregated or served consecutively. However, if the nonprison term is revoked the offender will serve the prison terms consecutively. See K.S.A. 2005 Supp. 21-4720(b)(4), (b)(7) and (b)(8).

Determining the Base Sentence and Primary Crime

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 2005 Supp. 21-4720(b) as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
 - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime, therefore, in the instance of sentencing with both the drug grid and nondrug grid, one crime having a presumption of imprisonment and one having a presumption of probation, the crime which presumes imprisonment shall be the primary crime.
 - When the offender is convicted of crimes sentenced on both the nondrug and drug grids, the primary crime is the one that carries the longest prison term, therefore, in the instance of sentencing with both the drug grid and nondrug, both crimes having the same presumption of either probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

The base sentence is where the severity level of the primary crime and the total criminal history score intersect on the appropriate guidelines grid and shall be the presumed sentence in months. The base sentence will have the full criminal history score assigned. However, nonbase sentences will not have criminal history scores applied and shall be calculated in the criminal history I column of the grid according to the severity level of the crime. K.S.A. 2005 Supp. 21-4720(b)(3) and (b)(5).

Departure Factors

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state the type of departure sought and the reasons relied upon. The parties are entitled to notice that the sentencing court is considering a departure, stating the type of departure intended by the court, and the reasons and factors relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. See K.S.A. 2005 Supp. 21-4718(a)(1) and (a)(3).

Upward durational departure sentencing was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face." In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to provide for a procedure that allows the jury to determine all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. These amendments became effective upon publication on June 6, 2002.

Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. K.S.A. 2005 Supp. 21-4716(b). A County or District Attorney seeking an upward durational departure sentence must file such motion not less than 30 days prior to the date of trial unless the trial is to take place in less than 30 days then such motion shall be filed within 5 days from the date of the arraignment. K.S.A. 2005 Supp. 21-4718(b)(1). The court shall determine if the presentation of the

evidence regarding the aggravating factors shall be presented to the jury during the trial of the matter or in a jury proceeding following the trial. K.S.A. 2005 Supp. 21-4718(b)(2). The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based on the reasonable doubt standard. See K.S.A. 2005 Supp. 21-4718(b)(4) and (b)(7).

At the conclusion of the departure hearing or within 20 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties. K.S.A. 2005 Supp. 21-4718(a)(2). Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 2005 Supp. 21-4718(a)(4). If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 2005 Supp. 21-4716(c)(3).

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and
- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 2005 Supp. 21-4716(d)(1)-(4).

Mitigating Factors - K.S.A. 2006 Supp. 21-4716 (c)(1)(A) - (E) and (e)

The following nonexclusive list of statutorily enumerated mitigating factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- A. The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- B. The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;
- C. The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- D. The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- E. The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

Subsection (e) was added during the 2006 Legislative session and provides additional mitigating factors to be considered. It provides that, *“Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial*

and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:

- i. The court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the prosecutor's evaluation of the assistance rendered;*
- ii. the truthfulness, completeness and reliability of any information or testimony provided by the defendant;*
- iii. the nature and extend of the defendant's assistance;*
- iv. any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from such assistance; and*
- v. the timeliness of the defendant's assistance." (See Chapter 194, Section 13, of the 2006 Session Laws)*

Aggravating Factors - K.S.A. 2006 Supp. 21-4716(c)(2)(A) - (H)

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

- A. The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- B. The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- C. The offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant's belief or perception was correct;
 - a. Note: The amendment to K.S.A. 2001 Supp. 21-4716 included the addition of a defendant's perception of the victim's race, color, religion, ethnicity, national origin or sexual orientation. As a result, a defendant's perception regarding the victim's background and not just the defendant's belief of the same, now applies. In other words a defendant's perception, versus just his or her belief of a victim's background, is no longer a defense.
- D. The offense involved a fiduciary relationship which existed between the defendant and the victim;
- E. The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;
- F. The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section; or
- G. The defendant was incarcerated at the time the crime was committed.

- H. *The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager or supervisor.* (See Chapter 194, Section 13, of the 2006 Session Laws.)

Additional Aggravating Factors for Drug Grid - K.S.A. 2005 Supp. 21-4717(a)(1) – (4)

In addition to the factors listed above, the following aggravating factors which apply to drug crime committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

1. The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
 - a. The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
 - b. The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
 - c. The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
 - d. The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
 - e. Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
 - f. Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
 - g. A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation or delivery of controlled substances.
2. The offender possessed illegal drugs:
 - a. With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
 - b. With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age; or
3. The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the age of the individual was under 16 years of age;
4. The offender was incarcerated at the time the crime was committed.

In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2005 Supp. 21-4717(b).

Sex Offenders Postrelease Supervision Departure

The sentencing court may depart from the normal postrelease supervision period to a period of up to 60 months if it is found that the primary crime of conviction is sexually violent or sexually motivated and the court states on the record substantial and compelling reasons to impose a departure. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(i) and (ii). The sentencing court may order a psychological evaluation be

prepared and the recommended program be completed by the offender. The department of corrections or the parole board shall ensure that court ordered sex offender treatment be carried out. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(iv).

Durational and Dispositional Departures

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 21-4719(b).

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). K.S.A. 21-4719(c) and (d). When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 21-4719(c)(2). However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

Departure and Consecutive Sentencing Combination

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

1. The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 2005 Supp. 21-4720(c)(1).
2. When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 2005 Supp. 21-4720(c)(2).
3. The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This means that the total prison term of the consecutive sentences must also remain within the limit of double the base sentence including the departure sentence. K.S.A. 2005 Supp. 21-4720(c)(3).

Example

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5) and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence

of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2×94 , or 188 months. Here, the total sum of $94 + 32 + 6$ would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping @ Maximum Presumptive Sentence = 100 months
(Kidnapping at severity level 3, criminal history "D" on the nondrug grid)
Other sentences: Aggravated Burglary and Theft = 32 and 6 months.
(Aggravated Burglary at severity level 5, criminal history "I" and
Theft at severity level 9, criminal history "I" on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2×200 , or 400 months. The sum of $200 + 32 + 6$, or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes $200 + 64 + 12$, or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "double-double rule." The application of the so-called "double-double" rule allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing.

Reporting Dispositions to the Kansas Bureau of Investigation and the Kansas Sentencing Commission

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2005 Supp. 21-3426(f). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 21-4714 to the Kansas Sentencing Commission **within 30 days after sentencing**. K.S.A. 2005 Supp. 22-3439(a).

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Revocation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2005 Supp. 21-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the department of corrections, the court shall forward a signed copy of the Journal Entry of Revocation to the Kansas Sentencing Commission **within 30 days of final disposition**. K.S.A. 2005 Supp. 22-3439(b). Even if the probation revocation hearing does not result in

the offender being imprisoned, a Journal Entry of Probation Revocation Hearing on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 74-9101(b)(5).

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 2005 Supp. 22-3439(c).

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to class A and B misdemeanors under Kansas criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 2005 Supp. 12-4106(e).

The Kansas Sentencing Commission staff will review felony Journal Entries for possible illegal sentences. The staff promptly will notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

CHAPTER VII: APPEALS

Appellate Review Principles – K.S.A. 21-4721

A departure sentence is subject to appeal by the defendant or the state, to the appellate courts in accordance with rules adopted by the Supreme Court. Pending review of the sentence, the sentencing court or the appellate court may order the defendant confined or placed on conditional release, including bond. On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record.

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are; supported by evidence on the record and, constitute substantial and compelling reasons for departure.

In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION

Postrelease Supervision

Upon completion of the prison portion of the imposed sentence, most inmates will be released to serve a term of postrelease supervision, plus the amount of good time earned and retained while imprisoned. K.S.A. 2005 Supp. 22-3717(a). Under the terms of House Substitute for Senate Bill 323, passed into law during the 2000 Kansas Legislative Session and effective May 25, 2000, for crimes committed on or after July 1, 1993, and sentenced under the KSGA, postrelease supervision is:

- 36 months for felonies classified in severity levels 1 through 4 on the nondrug grid and felonies classified in severity levels 1 and 2 on the drug grid;
- 24 months for felonies classified in severity levels 5 and 6 on the nondrug grid and felonies classified in severity level 3 on the drug grid;
- 12 months for felonies classified in severity levels 7 through 10 on the nondrug grid and felonies classified in severity level 4 of the drug grid except for some K.S.A. 65-4160 or 65-4162 offenses committed on or after November 1, 2003.

Offenders convicted of severity levels 1 through 6 on the nondrug grid and severity levels 1 through 3 of the drug grid may have their period of postrelease supervision reduced up to 12 months based on the offender's performance under supervision. Offenders convicted of severity levels 7 through 10 of the nondrug grid and severity level 4 of the drug grid may have their period of postrelease supervision reduced up to six (6) months based on the offender's performance under supervision. See K.S.A. 2005 Supp. 22-3717.

However, under the language found at K.S.A. 1993 Supp. 22-3717, for crimes committed prior to April 20, 1995, postrelease supervision lengths for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, were for a period of 24 months. Despite the retroactive application of the changes made to postrelease supervision periods under K.S.A. 22-3717 in the 2000 Kansas Legislative Session, it appears that offenders sentenced under the sentencing guidelines for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995, will continue to receive the postrelease supervision periods applicable for those crimes at the time the crimes were committed.

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term will determine the period of supervision for offenders ordered to serve more than one sentence, whether concurrent or consecutive. See K.S.A. 2005 Supp. 22-3717(d)(1)(F).

If an offender is convicted of a sexually motivated crime or sexually violent crime, as defined in K.S.A. 2005 Supp. 22-3717(d)(1)(F)(2)(A) through (L), the sentencing court based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(i) and (ii). The Kansas Parole Board may, in its discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(vi). Offenders convicted of crimes deemed “sexually violent or sexually motivated” must register with local law enforcement agencies according to the habitual sex offender

registration act, K.S.A. 22-4901 through 22-4910 and amendments thereto. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(vii).

The Parole Board will continue to review release plans. However, the Board will be unable to make any changes regarding release dates for offenders sentenced under the KSGA. K.S.A. 2005 Supp. 22-3717(i).

Violations of Conditions of Release; Probation or Postrelease Supervision

Probation

When an offender is sentenced for a felony committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence generally is mandated, and the sentencing court may sentence the offender to prison for the new offense even if that offense otherwise presumes a nonprison sentence. This is not considered a departure and does not require additional substantial and compelling circumstances on the record. K.S.A. 2005 Supp. 21-4603d(f) and 22-3716(b).

Postrelease Supervision

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment of 180 days, which may be reduced by up to 90 days based upon the performance of the inmate. K.S.A. 2005 Supp. 75-5217(b). If the violation results from a conviction of a new felony, upon revocation of postrelease supervision, the offender will serve the entire remaining balance of the postrelease supervision period in prison even if the new conviction does not result in a new prison term, including the amount of good time which had been earned before release. K.S.A. 2005 Supp. 75-5217(c). If an offender is returned to prison with a new misdemeanor conviction, upon revocation, the offender shall serve a period of confinement to be determined by the Kansas parole board, which shall not exceed the remaining balance of the period of postrelease supervision. K.S.A. 2005 Supp. 75-5217(d).

Conversion of Sentence for a Crime Committed After July 1, 1993, but Before March 24, 1994

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

1. Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
2. Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

Conversion of Sentence for a Crime Committed After March 24, 1994

On or after March 24, 1994, if an offender is sentenced to prison for a crime committed on or after July 1, 1993, while on probation, parole, conditional release or in a community corrections program, for a crime committed prior to July 1, 1993, and the offender is not eligible for retroactive application of the KSGA under K.S.A. 21-4724, the new sentence will not be aggregated with the old sentence. Instead, the offender will not begin to serve the new sentence until he or she is paroled, or reaches the conditional release date on the old sentence.

If the offender was past the conditional release date at the time the new offense was committed, the new sentence shall begin when the offender is ordered released by the Kansas Parole Board or reaches the maximum expiration date of the old sentence, whichever is earlier. Only at that point will the offender begin to serve the new sentence, which will also govern the postrelease supervision term. However, if the old sentence was life or an indeterminate term with life as the maximum, the offender will remain under supervision for life, or until discharged by the Parole Board. See K.S.A. 2005 Supp. 22-3717 (f).

CHAPTER IX: RETROACTIVITY

Retroactive Application of Sentencing Guidelines

The retroactive provision of the KSGA applies to offenders incarcerated who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4).

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. See K.S.A. 21-4724(c). The parties had 30 days in which to request a hearing to challenge the KDOC's determination of the crime severity or the criminal history, or to seek a departure sentence if the offender is eligible for conversion of the sentence to a guidelines sentence. See K.S.A. 21-4724(d).

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. If a hearing is requested, the sentencing court determined whether the offender is eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. See K.S.A. 21-4724(d). The sentencing court has the power to convert the sentence to a guidelines sentence that is a durational departure based on circumstances that existed at the time of the original sentencing. See K.S.A. 21-4724(e). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f).

K.S.A. 21-4724(b)(1) contains a provision concerning the modification of sentences for individuals convicted of pre-July 1, 1993, crimes that, had the crime been committed after July 1, 1993, would have been classified in grid blocks 3-H, or 3-I of the drug grid. K.S.A. 21-4724(b)(1) provides that such drug grid 3-H or 3-I crimes may be converted to KSGA determinate sentences "*pursuant to the provisions of subsection (c) of K.S.A. 21-4705, and amendments thereto.*"

This provision created the commonly referred to "small sale" exception for marijuana which allowed for the conversion of sentences equivalent to 3-H or 3-I drug grid sentences for only those individuals who fit within the "small sale" of marijuana definition that was found at K.S.A. 21-4705(c). See *State v. Hackler*, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). However, the changes made in K.S.A. 1996 Supp. 21-4705 eliminated the definition of a "small sale" of marijuana exception from subsection (c)

of the statute, and thus effectively eliminated the possibility of having a pre-guidelines conviction that would equate to a 3-H or 3-I drug grid conviction converted to a determinate sentence.

2000 Retroactivity Provisions

Legislation passed during the 2000 Kansas Legislative Session and found at Chapter 182, Section 6, 2000 Session Laws, or at K.S.A. 2000 Supp. 21-4611(d), also contained provisions with retroactive application for sentences under the Kansas Sentencing Guidelines Act. For a full description of those provisions, please see the **“TIMELINE OF CERTAIN IMPORTANT EVENTS RELATED TO THE KSGA”** section of this Manual.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

Crime severity and criminal history are the main factors which control sentencing decisions

The KSGA provides invaluable guidance to the sentencing court in the form of a rational sentencing structure based on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids reflect the sentences that are presumed to be appropriate in the vast majority of cases when these two factors are taken into consideration to determine whether the offender should be sent to prison and for what length of time.

Sentences imposed are served

The terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA are of a pre-established, binding duration. In other words, the offender will actually serve the sentence imposed by the sentencing court. The offender may earn good time in an amount no greater than 15% (after April 20, 1995) or 20% (before April 20, 1995) of the sentence, thereby reducing the portion of the sentence that must be served in prison, but that amount of good time will then be added to the period of postrelease supervision, so that the entirety of the term will not be affected or reduced. K.S.A. 2005 Supp. 21-4722.

Guidelines provide objectivity but leave room for properly justified exercise of discretion

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the upward durational departure problem arising from *Gould* and this change became effective on June 6, 2002. The jury now determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial. See K.S.A. 2005 Supp. 21-4716 and 21-4618.

Certain offenses (i.e., those that fall into border blocks on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently or consecutively and this authority allows imposition of a sentence up to twice the maximum presumptive term of imprisonment if substantial and compelling reasons for the departure are adequately stated on the record. See K.S.A. 2005 Supp. 21-4720.

Forms help make a record

In order to assist the sentencing court in making a complete record of all aspects of the sentencing proceedings, the Journal Entry of Judgment form approved by the Kansas Sentencing Commission facilitates inclusion of all requisite information and findings for the record in a concise and efficient manner. Under statute, each KSGA Journal Entry of Judgment must be on a form approved by the Kansas Sentencing Commission and this form must be used for all felony cases sentenced on or after July 1, 1993. See K.S.A. 2005 Supp. 22-3426. In addition, the sentencing court must forward a copy of the Journal Entry of Judgment, attached together with the Presentence Investigation Report to the Kansas Sentencing Commission within thirty (30) days of the sentencing. See K.S.A. 2005 Supp. 22-3439(a).

Each Journal Entry of Probation Revocation Hearing must also be on a form approved by the Kansas Sentencing Commission and be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2005 Supp. 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 74-9101(b)(5). Information for felony probation revocations based upon crimes committed on or after July 1, 1993 (and all class A and class B misdemeanor crimes and assault as defined in K.S.A. 21-3408, committed on or after July 1, 1993), must also be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. See K.S.A. 2005 Supp. 22-3439(c).

Court not bound by plea agreements

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 21-4713 and 21-4707(b)(4).

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. See K.S.A. 2005 Supp. 22-3210, K.S.A. 21-4713 and 21-4707(b)(4).

Informing the offender of the possible penalties when accepting a guilty or nolo contendere plea

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. See K.S.A. 21-4707 and K.S.A. 2005 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. See K.S.A. 21-4707(c)(4).

Presentence Investigation Report is mandatory

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender as is available. See K.S.A. 2005 Supp. 21-4714(a).

Challenges to criminal history; other hearings

If the offender does not agree in open court to the criminal history as reflected in the Criminal History Worksheet/Presentence Investigation Report and gives written notice of any errors contained there, the prosecutor will have to prove the disputed elements by a preponderance of the evidence at the hearing, and the sentencing court is authorized to give the prosecution reasonable time to produce such evidence. The offender must specify the exact nature of any alleged error if he/she objects to his/her criminal history worksheet. See K.S.A. 2005 Supp. 21-4715(c).

If any party seeks imposition of a departure sentence, a hearing on the matter must be held, and the parties must be given adequate time to prepare and present their arguments regarding the proposed departure. Written arguments may be submitted and oral arguments presented, and the sentencing court must review any victim impact statement. Copies of the Presentence Investigation Report must be provided to the parties prior to the hearing. The sentencing court will have up to twenty (20) days to rule. See K.S.A. 2005 Supp. 21-4718(a)(1), (2). Any departure from the presumptive sentence must be supported by substantial and compelling reasons stated on the record. See K.S.A. 2005 Supp. 21-4716(a), 21-4717(a), 21-4720(c)(1) and K.S.A. 21-4719(c)(2).

Appeals

Any sentence imposed by the sentencing court which is within the presumptive sentencing range provided for the crime on the proper grid, or which results from a plea agreement between the parties and is approved by the sentencing court on the record, is generally not appealable unless the determination of the severity level of the crime, or the criminal history of the offender are brought into question. A departure sentence is appealable to the extent that the reasons justifying the departure must be found to be supported by the evidence in the record and are substantial and compelling. Otherwise, review of departure sentences on appeal is limited to claims that the sentence resulted from partiality, prejudice, oppression, or corrupt motive. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the "Special Rule Applicable" section of the adult Journal Entry of Judgment form labeled "Extended Jurisdiction Juvenile Imposed," and should be checked in these cases.

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THEIR APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

- A. Specify whether a plea agreement was involved, if any of the charges were dismissed and whether the case involved a bench trial or a trial by jury.

4. HAVE BOTH PARTIES ACKNOWLEDGE RECEIPT OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK BOTH PARTIES IF THEY HAVE CHALLENGES TO THE CRIMINAL HISTORY.

- A. Require the parties to answer on the record.
- B. Address the defendant personally and ask whether he or she admits the criminal history set out in the Criminal History Worksheet. See K.S.A. 2005 Supp. 21-4715.
- C. If challenges to the criminal history exist, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
 - 1. Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
 - 2. A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
 - 3. If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
- D. If changes are made to the defendant's criminal history, the court should also make the actual changes on the Criminal History Worksheet.
- E. If the defendant's criminal history score changes due to a revision, the court should offer counsel a continuance to file a departure request or other presentence preparation required by the change(s).

6. ANNOUNCE THE CRIMINAL HISTORY SCORE.

7. ASK THE PARTIES IF THERE IS ANY LEGAL REASON WHY SENTENCE SHOULD NOT BE PRONOUNCED AT THIS TIME.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

- A. There is no prescribed proceeding for a departure hearing under K.S.A. 2005 Supp. 21-4718.
- B. A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- C. If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, “or within 20 days thereafter.” See K.S.A. 2005 Supp. 21-4718(a)(2).

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

- A. This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of “departure sentencing,” a continuance must be granted. See K.S.A. 2005 Supp. 21-4718(a)(1).

10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW WITNESSES FOR EITHER PARTY TO TESTIFY.

- A. Sentencing for an upward durational departure was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face.” Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. See K.S.A. 2005 Supp. 21-4716(b).
- B. A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 5 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 2005 Supp. 21-4718(b)(1).
- C. The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 2005 Supp. 21-4718(b)(2).
- D. The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based beyond the reasonable doubt standard. K.S.A. 2005 Supp. 21-4718(b)(4) and (b)(7).

11. ASK IF ANY VICTIMS OR OTHERS WISH TO SPEAK.

- A. Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

12. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION.

- A. Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow any statements or evidence.

13. ANNOUNCE THE BASE SENTENCE FROM THE APPROPRIATE GRID.

- A. "I hereby establish Count ___ as the base sentence. For the offense of _____, a severity level ___ (person or nonperson) ___ (drug or nondrug) felony, on which the defendant has a criminal history score of ___, thus placing him/her in grid block _____. I hereby sentence the defendant to a term of ___ months in the custody of the Secretary of Corrections. On this sentence the defendant may earn up to ___ months of good time credit and would be subject to ___ months of post-release supervision." If a fine is to be imposed, also announce the fine and the reasons for the fine. See K.S.A. 21-4607.

14. ANNOUNCE ANY DEPARTURES FROM THE BASE SENTENCE AND THE REASONS FOR THE DEPARTURE(S).

- A. Statutory mitigation and aggravation factors may be found at K.S.A. 2005 Supp. 21-4716 (nondrug) and K.S.A. 2005 Supp. 21-4717 (drug).
- B. Sentencing courts must provide separate reasons based upon facts in the record, for any/every durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- C. Reasons for departure must be "substantial and compelling." See K.S.A. 2005 Supp. 21-4716(a), 21-4717(a) and K.S.A. 21-4719(c)(2). If the court is imposing a durational postrelease supervision departure under K.S.A. 2005 Supp. 22-3717(d), specifically state on the record the substantial and compelling reasons relied upon to impose a departure. See *State v. Anthony*, 273 Kan. 726 45 P.3d 852 (2002).
- D. Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2005 Supp. 21-4718(a)(4).
- E. For sex offenders, a post-release supervision period of up to 60 months may be required. K.S.A. 2005 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2005 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

15. IF A SPECIAL RULE APPLIES WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED.

Special Sentencing Rules

K.S.A. 2005 Supp. 21-4704(h)	Person felony committed with a firearm – presumed prison.
K.S.A. 2005 Supp. 21-4704(g)	Aggravated battery on a LEO, if criminal history is 6H or 6I – presumed prison.
K.S.A. 2005 Supp. 21-4704(g)	Aggravated assault on a LEO, if criminal history is 6H or 6I – presumed prison.
K.S.A. 2005 Supp. 21-4704(k)	Felony committed for the benefit of a criminal street gang – presumed prison.
K.S.A. 2005 Supp. 21-4704(j)	<u>Persistent</u> sex offender if current conviction is presumed prison – double the maximum duration.
K.S.A. 2005 Supp. 21-4704(i)	Felony DUI, third, fourth or subsequent conviction – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 8-1567, term of imprisonment not to be served in KDOC.
K.S.A. 2005 Supp. 21-4704(i)	Felony domestic battery, third or subsequent conviction within five years – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3412a(b)(3), term of imprisonment not to be served in KDOC.
K.S.A. 2005 Supp. 21-4603d(f)	New crime committed while incarcerated and serving a sentence for a felony or while on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony – new sentence consecutive to old pursuant to K.S.A. 21-4608(c).
K.S.A. 2005 Supp. 21-4603d(f)	New felony committed while on felony bond – new sentence consecutive to old pursuant to K.S.A. 21-4608(d).
K.S.A. 38-1636, 38-16,126(a)	Extended jurisdiction juvenile imposed – both juvenile and adult sentences imposed, adult sentence stayed conditioned on successful completion of juvenile sentence.
K.S.A. 2005 Supp. 21-4705(e)	Second or subsequent conviction for manufacture, or the attempted manufacture of a controlled substance – presumed prison, twice the maximum duration.
K.S.A. 2005 Supp. 21-4704(l)	Residential burglary after a prior residential or a non-residential burglary or an aggravated burglary conviction – presumed prison.

- K.S.A. 2005 Supp. 17-12a508(a)(5) Any violation of the Kansas Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more – presumed prison.
- K.S.A. 2004 Supp. 17-1253(f)(1) A violation resulting in a loss of \$25,000 or more.
(Repealed July 1, 2005)
- K.S.A. 2004 Supp. 17-1254(f)(1) A violation resulting in a loss of \$25,000 or more.
(Repealed July 1, 2005)
- K.S.A. 2004 Supp. 17-1255(b)(1) A violation resulting in a loss of \$25,000 or more.
(Repealed July 1, 2005)
- K.S.A. 2005 Supp. 21-4704(i) Second forgery conviction, if criminal history is I to C – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3710(b)(3), term of imprisonment not to be served in KDOC.
- K.S.A. 2005 Supp. 21-4704(i) Third or subsequent forgery conviction, if criminal history is I to C – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-3710(b)(4), term of imprisonment not to be served in KDOC.
- K.S.A. 2005 Supp. 9-2203(c) Second or subsequent conviction of a violation of the Mortgage Business Act, K.S.A. 9-2201 *et. seq.* – presumed prison.
- K.S.A. 2005 Supp. 50-1013(a) Any violation of the Loan Brokers Act, K.S.A. 50-1001 *et. seq.*, resulting in a loss of \$25,000 or more – presumed prison.
- K.S.A. 2006 Supp. 21-4704(i) Felony animal cruelty, intentional and malicious violation of K.S.A. 21-4310(a)(1) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-4310(d)(1), term of imprisonment not to be served in KDOC.
- K.S.A. 2006 Supp. 21-4704(i) Felony animal cruelty, intentional, second or subsequent violation of K.S.A. 21-4310(a)(2) – (a)(5) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-4310(d)(2), term of imprisonment not to be served in KDOC.
- K.S.A. 2006 Supp. 21-4704(i) Felony animal cruelty, working/assistance dogs, violation of K.S.A. 21-4318(a) – sentenced pursuant to the specific mandatory sentencing requirements of K.S.A. 21-4318(c), term of imprisonment not to be served in KDOC.
- K.S.A. 2006 Supp. 21-4642 Aggravated habitual sex offender – life imprisonment without opportunity for parole.
- K.S.A. 2005 Supp. 21-4705(f) Third or subsequent possession of a controlled substance in violation of K.S.A. 2005 Supp. 65-4160 or K.S.A. 65-4162 – presumed prison.

16. IF A DURATIONAL DEPARTURE IS GRANTED, THE TOTAL LENGTH OF THE DEPARTURE SENTENCE CANNOT EXCEED TWICE THE BASE SENTENCE.

See K.S.A. 2005 Supp. 21-4720(b)(4).

17. ANNOUNCE ALL OTHER SENTENCES AND WHETHER EACH SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE BASE SENTENCE.

See K.S.A. 2005 Supp. 4720(b).

- A. The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 21-4608(c),(d) and (e). K.S.A. 21-4608(a).
- B. The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “Double-Double” Rule is found at K.S.A. 2005 Supp. 21-4720(b)(4) and was discussed and applied in *State v. Peterson*, 22 Kan. App. 2d 576, 920 P.2d 463 (1996).
- C. Only the primary crime will have the full criminal history applied. Non-base crimes will have a criminal history score of “I” applied, regardless of whether they are to run concurrently or consecutively. K.S.A. 2005 Supp. 21-4720(b)(5), see also *State v. Bowen*, 20 Kan. App. 2d 576, 890 P.2d 374 (1995).

18. ANNOUNCE WHETHER PROBATION OR COMMUNITY CORRECTIONS PLACEMENT IS GRANTED. IF DEPARTING FROM A PRESUMPTIVE DISPOSITION, STATE THE REASONS ON THE RECORD. ANNOUNCE THE CONDITIONS AND THE DURATION OF PROBATION.

In the event the offender is sentenced for a first or second violation of K.S.A. 2005 Supp. 65-4160 or K.S.A. 65-4162, and the offender is eligible for certified drug abuse treatment under K.S.A. 21-4729 (2003 Senate Bill 123), the offender should be informed on the record that under the provisions K.S.A. 21-4729: certified drug abuse treatment may last for a period of up to 18 months; the offender may be responsible for repayment of the costs of treatment which will be determined by the sentencing court after an assessment by community corrections; if the offender is unsuccessfully discharged or voluntarily quits the mandatory treatment, the offender would be subject to the entire underlying prison sentence with no jail time credit for time spent in treatment; every condition violation shall be subject to some form of nonprison sanctions (i.e., county jail time, fines, community service, intensified treatment, house arrest, electronic monitoring, etc.); absent a judicial finding, condition violations alone will not result in discharge from treatment; and upon the successful completion of a certified drug abuse treatment program the offender will be discharged and not subject to postrelease supervision.

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING IF THIS IS IN DISPUTE.

20. ESTABLISH THE NUMBER OF DAYS OF JAIL TIME CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT’S “SENTENCE BEGINS DATE.”

See K.S.A. 2005 Supp. 21-4614 and K.S.A. 21-4614a.

21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT UNDER K.S.A. 2004 Supp. 21-4619.

22. IF THE CASE WAS TRIED, OR IF YOU HAVE RULED ADVERSELY TO THE DEFENDANT AT THE HEARING, ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL UNDER K.S.A. 21-4721.

23. ADVISE THE DEFENDANT OF THE OBLIGATION TO REGISTER AS A SEX OFFENDER, IF APPLICABLE.

See K.S.A. 2005 Supp. 22-4905(b)(1) and (b)(2)(A).

24. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.

See K.S.A. 2005 Supp. 21-4204(a)(2) through (a)(4).

25. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER’S SENTENCE IS FULLY DISCHARGED.

See K.S.A. 2005 Supp. 21-4603, 21-4603d and 21-4615. Anyone convicted of a felony on or after 07/01/02 may not vote until his or her “sentence” is completed. This specifically includes a sentence of probation.

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION AND/OR COMMUNITY CORRECTIONS IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND HOW TO REPORT TO THOSE AGENCIES.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

Emphasis of guidelines is on criminal history and crime severity

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of Journal Entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. See K.S.A. 2005 Supp. 21-4715.

Plea agreements

The prosecution may enter into plea negotiations and agreements with the offender, although there are some limitations on the type of agreement that can be reached. An agreement by the prosecutor not to allege prior convictions that will enhance the crime severity level or will affect the criminal history of the offender is **impermissible**. However, the prosecutor may agree to a dismissal of some charges or counts in return for a plea by the offender to the charged offense or to a lesser or related charge. The prosecution may also agree to file or not to file a particular charge or count, to make a recommendation for a particular sentence within the appropriate sentencing range on the grid, or to make a recommendation for a departure sentence where substantial and compelling departure factors exist and are stated on the record. See K.S.A. 2005 Supp. 22-3210, K.S.A. 21-4713 and 21-4707.

Departure hearings

The prosecution may file a motion alleging that substantial and compelling aggravating circumstances exist which call for a more severe sanction than the presumptively appropriate sentence provided by the guidelines. If the grid establishes a presumptive nonprison sentence for the crime of conviction, the prosecution may seek a dispositional departure in the form of a prison sentence. If the grid establishes a presumptive prison sentence within the range of time provided within the appropriate grid block, the prosecution may seek an upward durational departure in the form of a longer prison sentence. The prosecution is also free to seek a downward dispositional or durational departure based on the existence of substantial and compelling mitigating circumstances. The KSGA contains non-exclusive lists of aggravating and mitigating circumstances on which motions for departures can be based. See K.S.A. 2005 Supp. 21-4716 and 21-4717.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 subsequently were amended to correct the upward durational departure problem arising from *Gould* and the changes became effective on June 6, 2002. The jury now

determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 2005 Supp. 21-4716 and 21-4618.

Written and/or oral arguments may be presented to the sentencing court in support of any motion by the prosecution for a departure from the presumptive guidelines sentence or in response to any such motion by the offender when the matter of the proposed departure is set for hearing. The prosecution will have the duty to notify the victim(s) or their families of any departure hearings. See K.S.A. 2005 Supp. 21-4718, 21-4720 and K.S.A. 21-4719.

Definite terms of sentence imposed

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of specific duration, the prosecutor will be able to inform the victim(s) and their families about the amount of time the offender will serve in definite terms.

Using the Journal Entry of Judgment form to assist the court in making a proper record

The prosecution can also help the sentencing court to make a complete record of all phases of the sentencing proceedings, which are required by the guidelines through use of the Journal Entry of Judgment form approved by the Kansas Sentencing Commission. The use of the Journal Entry form is mandated by the KSGA and it provides guidance in conducting the sentencing process by including all essential information and findings on the record. See K.S.A. 2005 Supp. 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1997. In addition, the court must forward a copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2005 Supp. 21-4714, to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2005 Supp. 22-3439.

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2005 Supp. 22-3426a(c) and 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 74-9101(b)(5). Information for felony probation revocations, which do not result in imprisonment in the KDOC, must be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. K.S.A. 2005 Supp. 22-3439(c).

Appeals

The prosecution may appeal when the sentencing court imposes a sentence that constitutes an unfavorable departure. If the sentencing court imposes a nonprison sentence that constitutes a departure because the guidelines establish a presumption for a prison sentence for the crime of conviction, this dispositional departure may be appealed by the prosecution. If the sentencing court imposes a prison sentence of shorter duration than the presumptive term provided by the guidelines for the crime of conviction, this durational departure may also be appealed by the prosecution. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* A box is located in the “Special Rule Applicable to Sentence, If Any” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

Importance of accurate, verified criminal history

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet and an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report, the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2005 Supp. 21-4715.

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2005 Supp. 21-4714. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

Plea agreements

Plea bargaining remains an available tool for use by defense counsel, subject to certain limitations. The KSGA **prohibits** the use of plea bargaining which involves a promise from the prosecutor not to allege prior convictions that may operate to enhance the crime severity level or are included in the offender's criminal history. However, the offender may enter a plea to the charged offense or to a lesser or related charge in return for the dismissal of other charges or counts. The offender may also obtain from the prosecution a promise to recommend a particular sentence within the appropriate sentencing range on the grid. In addition, the offender is free to secure a promise from the State to recommend a departure sentence favorable to the offender where mitigating departure factors exist. An agreement that a particular charge or count will or will not be filed, or any other promise not explicitly precluded by the KSGA, is permissible. However, the sentencing court will not be bound by any plea agreement proposed by the parties. See K.S.A. 2005 Supp. 22-3210, K.S.A. 21-4713 and 21-4707.

Can seek dispositional or durational departure on behalf of offender

The offender may file a written motion alleging the existence of substantial and compelling mitigating circumstances that support the imposition of a less severe sanction than that provided by the KSGA for the crime of conviction. When the guidelines call for a prison sentence, the offender may move the sentencing court to impose a nonprison sentence as a dispositional departure. When the guidelines call for a prison sentence within the range of time provided by the appropriate grid block, the offender may move the sentencing court to impose a shorter prison sentence as a downward durational departure. See K.S.A. 2005 Supp. 21-4716, 21-4717, 21-4718, 21-4720 and K.S.A. 21-4719.

The offender may also be given the opportunity to offer written and/or oral arguments at the hearing on a motion for a departure favorable to the offender or in opposition to any unfavorable departures that may be proposed by the prosecution or the sentencing court on its own motion. See K.S.A. 2005 Supp. 21-4718.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2002 Supp. 21-4716 and K.S.A. 2002 Supp. 21-4718 were amended to correct the upward durational departure problem arising from *Gould* and the changes became effective on June 6, 2002. The jury now determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 2005 Supp. 21-4716 and 21-4618.

Can advise the offender about time to be served in definite terms

Because the terms of imprisonment, nonprison sentences and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

Appeals

The offender may appeal a sentence that constitutes a departure unfavorable to the offender. The imposition of a prison sentence where the guidelines provide a presumptive nonprison sentence is an appealable dispositional departure. The imposition of a prison sentence of greater duration than the guidelines presume is an appealable durational departure. A departure sentence is appealable on the grounds that substantial and compelling reasons justifying the departure are not supported by the record.

Appellate review of departure sentences imposed pursuant to the guidelines is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive, or claims challenging the crime severity ranking or the criminal history. See K.S.A. 21-4721.

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* A box is located in the “Special Rule Applicable to Sentence, If Any” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS

Preparation of the Presentence Investigation Report

Field services officers, including court services officers and community corrections officers, will be responsible for the preparation of the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime(s) of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime(s) of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender. The PSI report will not contain socio-economic information about the offender and should not contain sentencing recommendations to the sentencing court.

The criminal history worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

The criminal history worksheet can be challenged for accuracy by the defense or the prosecution, and a hearing will then be held in which the prosecution has the burden of proving prior convictions through certified copies of journal entries or any other properly authenticated documents and proving by a preponderance of the evidence that any challenged component of the history is correct. See K.S.A. 2005 Supp. 21-4715. The sentencing court has the duty and authority to correct any errors. A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2005 Supp. 21-4714(f).

NOTE: The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in an adjudication.
- **Adults:** Do not include traffic infractions, diversions (except as indicated on p. 48), contacts with law enforcement, or arrests not resulting in conviction.

Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

The 2006 Presentence Investigation Report form contains a section on the last page of the form to be used by field services officers to indicate which criteria of K.S.A. 2005 Supp. 75-5291(a)(2) is met by an offender who is being recommended for placement in a Community Corrections program. Field services officers completing PSI forms need to make certain to indicate for the sentencing court the specific box or boxes under which the offender may qualify for placement in Community Corrections.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

Providing documentation of prior convictions

Because of the heavy focus on criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of Journal Entries and other documents, including requests from other jurisdictions.

Presentence Investigation Report

The Presentence Investigation Report (PSI), *with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant*, will be public record and can be kept in the court file. See K.S.A. 2005 Supp. 21-4714.

Copies of required documents

A copy of the Journal Entry of Judgment, the Presentence Investigation Report and the Criminal History Worksheet of the Presentence Investigation Report, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. See K.S.A. 2005 Supp. 21-4714(g) and 22-3439(a).

A copy of the Journal Entry of Probation Revocation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report and the Criminal History Worksheet with in 30 days of the final disposition. See K.S.A. 2005 Supp. 22-3439(b).

Extended jurisdiction juvenile cases

Under K.S.A. 38-16,126(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult journal entry form to indicate that the journal entry is for a case where “Extended Jurisdiction Juvenile Imposed.” A copy of the Journal Entry for the extended jurisdiction juvenile sentence must be forwarded to the Kansas Sentencing Commission within 30 days of sentencing, just as is the case with adult felony offenders.

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